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No. 06-

In The

Supreme Court of the United States

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC., *Appellant,*

v.

FEDERAL ELECTION COMMISSION, *Appellee,*

and

JOHN MCCAIN, RUSSELL FEINGOLD, CHRISTOPHER SHAYS, MARTIN MEEHAN, AND TOM ALLEN, *Intervening Appellees.*

On Appeal from the United States District Court
for the District of Columbia

Jurisdictional Statement

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October 26, 2006

Questions Presented

The Christian Civic League of Maine, Inc. ("League") sought declaratory and injunctive relief to permit it to broadcast a grass roots lobbying advertisement (and materially-similar future ads) during the electioneering communication prohibition period ("the prohibition") imposed by the Bipartisan Campaign Reform Act of 2002 ("BCRA"). 2 U.S.C. § 441b.

1. Whether the district court erred in dismissing this case as moot, not ripe, and not within the exception to the mootness doctrine for matters that are capable of repetition yet evading review.

2. Whether the prohibition is narrowly tailored to a compelling governmental interest as applied to the League's proposed advertisement (and materially-similar future ads) or violates the League's constitutional rights to free expression, association, and petition.

3. Whether the prohibition is narrowly tailored to a compelling governmental interest as applied to genuine grassroots lobbying, under an appropriate general rule, or violates the constitutional rights to free expression, association, and petition.

Parties to the Proceedings

The names of all parties to the proceeding in the court below whose judgment is sought to be reviewed are contained in the caption of this case. Rule 14.1(b).

Corporate Disclosure Statement

The Christian Civic League of Maine, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

Notice of Statutory Expedition & Advancement on the Docket

In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress specified that in reviewing constitutional challenges, such as the present one, "[i]t shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal." BCRA § 403(a)(4), 116 Stat. at 114, App. 22a.

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Opinions Below

The district court opinion dismissing this case is unreported but available at 2006 WL 2792683 (D.D.C. 2006). The opinion and order are reprinted in the Appendix. App. 1a, 15a.

Jurisdiction

This case was dismissed on September 27, 2006. The League noticed appeal on October 6. This Court has appellate jurisdiction over the final decision of the three-judge court under both BCRA § 403 (App. 22a) and 28 U.S.C. § 1253.

Constitutional & Statutory Provisions

Constitutional and statutory provisions are set out in the Appendix, as listed in the table of contents preceding it.

Statement of the Case

On April 3, 2006, the League filed its verified complaint seeking declaratory and injunctive relief allowing it to fund the broadcast of genuine grassroots lobbying communications, including its Crossroads Ad,[1] asking the people of Maine to call their Senators and urge them to support a constitutional amendment protecting marriage. The vote on this constitutional amendment was scheduled for June 5. The Ad would have been

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[1]The **Crossroads Ad** follows, Verified Complaint ("VC"), Exh. A:

Our country stands at the crossroads—at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges - by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202-224-3121 and ask for your senators. Again, that's 202-224-3121. Thank you for making your voice heard. Paid for by the Christian Civic League of Maine, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

an "electioneering communication"[2] because it mentioned a federal candidate, Sen. Snowe (who was unopposed in the June 13 primary), so the League was prohibited from paying for the Ad with corporate funds for thirty days before that primary. *See* 2 U.S.C. § 441b(a) & (b)(2) (the "prohibition").

The League sought a preliminary injunction permitting it to broadcast the Ad. The three-judge court (BCRA § 403(a)(1)) denied the preliminary injunction. On September 27, the lower court dismissed this case as moot (and unripe as to materially-similar future ads) and not within the mootness exception for cases capable of repetition yet evading review. App. 1a, 15a. The League noticed appeal on October 6. App. 32a.

The League is a Maine nonprofit, nonstock, ideological[3]

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[2]An "'**electioneering communication**' means any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office [and] is made within . . . 60 days before a general . . . election for the office sought by the candidate; or . . . 30 days before a primary . . . election . . . for the office sought by the candidate; and . . . is targeted to the relevant electorate." 2 U.S.C. § 434(f)(3)(A)(i) (emphasis added); *see also* 11 C.F.R. § 100.29. The **prohibition** provides that "[i]t is unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any [Federal] election. . . . For purposes of this section . . . , the term 'contribution or expenditure' includes . . . any applicable electioneering communication . . . ." 2 U.S.C. § 441b(a)-(b); *see also* 11 C.F.R. §§ 114.2 and 114.14.

[3]The League's **By-Laws** set forth its ideological purpose:

> The purpose of the Christian Civic League of Maine shall be to present and maintain an effective, positive and faithful witness in the public life of our state; to have an impact on the development of public policy in Maine; to uphold a biblical standard of justice and righteousness; and to reflect a genuine Christina [sic] compassion and respect for all people. The League shall endeavor to (1) promote good citizenship; (2) elect honest and competent officials; (3) secure good laws and their impartial execution; and (4) cooperate and assist the home, church and schools in these efforts.

Heath Dep. Exh. 1, ¶ 2.

corporation recognized as tax exempt under § 501(c)(4) of the Internal Revenue Code. VC ¶ 20. It was formed in 1897. Heath Dep. 14:12-14. Within the past two and a half years the League has only produced voter guides to pursue its goal of electing honest and competent officials. Heath Dep. 16:18-17:8. The League intends to continue producing voter guides, but it has not endorsed or opposed candidates for office, nor does it intend to do so, even through its associated state political action committee, the Christian Action League. Heath Dep. 17:2-4, 23:16-24:9; 25:2-12; 93:12-17.[4]

The Federal Election Commission is the government agency charged with enforcing the relevant provisions of the Federal Election Campaign Act, as amended by BCRA.[5]

Sometime in, or prior to, 2004 the League became aware that Congress was considering a federal constitutional amendment protecting marriage. Heath Dep. 33:16-25. The League engaged in grassroots lobbying for the federal Marriage Protection Amendment in 2004 through phone calls, e-mail, the Internet, printed and Internet versions of its newsletter, *The Record* (the League's newsletter, now online at http://www.cclmaine.org/), bulletin inserts, and a radio ad encouraging people to contact Senators Snowe and Collins and ask them

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[4]The League has been associated for approximately 15 years with Focus on the Family, Heath Decl. ¶ 3 (April 21, 2006), which often corresponds with the League regarding policy issues of mutual interest, including the federal Marriage Protection Amendment. Heath Decl. ¶ 7. The defense of traditional marriage is a high priority for both organizations. Heath Decl. ¶ 4. State court decisions requiring recognition of civil unions and homosexual marriage have highlighted for the League the need for a federal Marriage Protection Amendment. Heath Decl. ¶ 5.

[5]As discussed below, *infra* at 24, the FEC refused to make a rule excepting grassroots lobbying from the prohibition in its initial post-BCRA rulemaking and has twice recently refused to do so when asked to do so after this Court in *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) ("*WRTL*"), took note of the FEC's authority to create such a rule.

to support traditional marriage. Heath Decl. ¶ 8, Heath Dep. 34:8-11, 35:1-8.[6]

The Marriage Protection Amendment, S.J. Res. 1, was introduced in January 2005. A cloture vote was likely to occur in early June 2006.[7] The decision regarding when to run ads like the Crossroads Ad is necessarily tied to legislative decisions about debate and votes on the federal Marriage Protection Amendment. Heath Decl. ¶ 12; *see also* Heath Dep. 47:1-9. Because the timing of grassroots lobbying campaigns is inherently dependent on legislative whims, it is difficult to plan specific campaigns in advance, and they are often created and executed within very short time frames. Heath Decl. ¶ 12. Such is the case with the Crossroads Ad, which was developed because the Senate had finally decided to hold a vote on the

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[6]The **2004 Ad** that the League broadcast by radio stated:

> The Christian Civic League of Maine is organizing a campaign to let Senators Snowe and Collins know that we support the Federal Marriage Amendment. If you want homosexual marriages banned in our country, we need you to contact your Senators and ask them to support traditional marriage. For more information on this amendment please see our website at www.cclmaine.org or call us at our Augusta office at 622-7634. Thank you for preserving the purity of life and protecting the future of this nation.

Pl.'s Resp. to Def.'s Req. for Prod. # 2, 3 and 4, "Radio Announcement, July '04."

[7]VC ¶ 9; *see also* Def.'s Ex. J in Supp. of Its Opp'n to Pl.'s Mot. for Prelim. Inj., *Republican Chief Outlines Strategy to Portray Democrats as Weak, Bypass Mainstream Media*, Feb. 11, 2006 (Frist "said he would push for a vote on June 5 on 'the marriage protection amendment.'"). Previous versions of a federal constitutional amendment to protect traditional marriage had not garnered sufficient support in Congress. VC ¶ 10. Therefore, the progress of S.J. Res. 1 in the Senate was critical. VC ¶ 10. Tim Russell, the League's lobbyist, had participated in multiple conference calls, e-mail exchanges, and discussions with legislators, grassroots activists, media, and national level pro-family groups regarding the federal Marriage Protection Amendment. Heath Decl. ¶ 9.

federal Marriage Protection Amendment in early June. Heath Decl. ¶ 12. The League had confirmed its plan to run the Crossroads Ad 22 times per week at a cost of $998 per week. Heath Decl. ¶ 15; Heath Decl. Ex. A. One long-time donor had committed to paying the entire $3,992 cost of the radio buy so that the ads could be run for four weeks as scheduled. Heath Decl. ¶ 16.

The League has been critical of Sen. Snowe's positions on marriage and partial-birth abortion, Heath Dep. 83:14-21, and would prefer a candidate whose views are closer to its own. Heath Dep. 85: 14-18. But "CCL has not 'opposed' Senator Olympia Snowe or 'endorsed' an opponent of hers in an election for federal office." Pl.'s Resp. to Def.'s Interrog. # 12; Heath Dep. Ex. 10 ¶ 12. Moreover, the Crossroads Ad should not have had any constitutionally cognizable effect on Sen. Snowe's primary election because she was unopposed. Heath Dep. 74:6-9.

The Crossroads Ad expressed an opinion on pending Senate legislative activity, which was imminently up for a vote, and urged listeners to contact their Senators and urge them to vote a certain way, so the Ad constituted genuine grassroots lobbying. The Ad dealt with concrete, imminent, legislative issues, beyond the timing and control of the League, with which the two incumbent Senators would have to deal. The Ad referred to both a candidate and a non-candidate and dealt with them equally. The Ad dealt exclusively with the legislative issue, with which the League had a clear and long-held interest, not on any candidate, and did not refer to any political party or election. The Ad did not expressly advocate the election or defeat of a clearly identified candidate for federal office. The Ad only commented on the League's opinion of prior votes on the marriage issue and did not comment on a candidate's character, qualifications, or fitness for office. The Ad was broadcast independent of any candidate or political party, i.e.,

it was not "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." 11 C.F.R. § 109.20(a).

Broadcast ads were the most effective communication medium for the League's grassroots lobbying campaign, and non-broadcast communications would not have provided the League with sufficient ability to reach the people of Maine with its message. VC ¶ 46; Pl.'s Resp. to Def.'s Interrog. # 2, 3; Heath Dep. Ex. 10 ¶ 2, 3.[8]

Creating a federal political action committee would be more burdensome for the League than maintaining its affiliated State PACs because there are no limits on contributions to those state entities because they were formed to support or oppose referenda. Heath Decl. ¶ 20. Federal PACs are subject to contribution limits because they are presumed to be formed for the purpose of supporting or opposing candidates. Heath Decl. ¶ 20. Federal corporate PACs are also limited to fundraising from the corporation's members, which necessarily limits the pool of available contributors to the League's approximately 300 members[9] and would not encompass its nearly 2,500 supporters.

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[8]While a non-broadcast communication has some effectiveness with regard to those who receive it, such communication is necessarily limited by the number of subscribers that the League has to receive those communications, and broadcast ads, particularly radio ads, are more effective because they consistently reach more persons per dollar spent. Heath Decl. ¶ 17; Pl.'s Resp. to Def.'s Interrog. # 2, 3; Heath Dep. Ex. 10 ¶ 2, 3. The League has found that renting phone lists and hiring a phone bank for a telephone campaign is costly and not as effective as broadcast ads. Heath Decl. ¶ 18. People are more receptive to broadcast ads than the intrusive ring of unsolicited telephone calls, which seem to come at inopportune moments. Heath Decl. ¶ 18.

[9]Membership in the League is limited to those who "sign[] a statement that they agree with the [the League]'s mission, Statement, Purpose and Statement of Faith . . . and who pay[] the annual membership fee." (Heath

Heath Decl. ¶ 20; Heath Dep. 41:9-42:14. The limited pool of donors would make it much more difficult to raise the funds needed to engage in a broadcast advertising campaign such as the "Crossroads" campaign that the League planned to undertake in support of the federal Marriage Protection Amendment. Heath Decl. ¶ 20.

In addition, some of the League's members have theological objections to contributing to political action committees, Heath Decl. ¶ 21; Heath Dep. 103:24-104:4, and some Christians are reluctant to link the church and the state too closely. Heath Decl. ¶ 21. Because some of the League's members subscribe to this belief, it would increase its difficulties in raising money for a federal political action committee. Heath Decl. ¶ 21.

Finally, altering the League's ads so as to not mention the names of Maine's two Senators would not have been as effective, because the point of the grassroots lobbying effort was to ask the citizens of Maine to call their Senators and tell them how they would like them to vote on the federal Marriage Protection Amendment. Heath Decl. ¶ 22. Naming the Senators makes potential callers more comfortable in calling because they can simply ask for him or her by name rather than dealing with the awkwardness of saying, "I'm from Maine, I don't know the name of my Senator but can you connect me to him." Heath Decl. ¶ 22. And saying "call your Senator" is not an option, as the League's executive director understands, Heath Decl. ¶ 22, because 11 C.F.R. § 100.29(b)(2) specifically says that an electioneering communication "refers to a clearly identified candidate" when it uses an "unambiguous reference" such as "your Congressman."

Dep. Exh. 1, ¶ 4a, By-Laws). Further, "[a]ll board members, officers, committee members and employees of [the League] must be members of [the League]." *Id.*

The Questions Presented Are Substantial

This appeal presents two substantial questions. The first is whether the familiar exception to the mootness doctrine—for situations capable of repetition yet evading review—may be redefined in such a way that no citizen group could ever challenge the electioneering communication prohibition as applied to genuine grassroots lobbying, even though this Court said such challenges are permissible in *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) ("*WRTL*"). Part I explains the district court's error in failing to apply the mootness exception, and Part II.D explains how this latest dismissal is part of "endless loop" arguments by the FEC and Intervenors to avoid a decision on the merits, so that this Court needs to establish a rule of general applicability to avoid the necessity of endless, costly litigation by small citizen groups such as the League in an effort to vindicate First Amendment rights. Part II deals with the second substantial question, whether an exception for properly defined grassroots lobbying is required.[10]

I. This Case Fits the Mootness Exception.

This case readily fits within the exception to the mootness doctrine because there is a "'reasonable expectation' . . . that

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[10]The questions presented are substantially greater than the harm to only the League's First Amendment expression, association, and petition rights. Grassroots lobbying is a time-honored way that citizens involve themselves in the American system of participatory democracy. It is the essence of self-government. Numerous citizen groups await a ruling on the merits. Congress has recognized that constitutional challenges to BCRA are so substantial that it provided a special jurisdictional statute channeling all challenges to one court, with a three-judge panel, with direct, expedited appeal to this Court. BCRA § 403. There is no possibility of cases from other circuits percolating up to provide circuit splits on the BCRA itself until sometime well after January 1, 2007, when challenges to BCRA may begin to be brought in other federal courts (although challengers may yet choose the BCRA jurisdictional route, if desired). *Id.*

the same *controversy* will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (emphasis added) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). The same "controversy" would mean that the League will again be subject to the prohibition when it needs to engage in grassroots lobbying. *Los Angeles v. Lyons*, 461 U.S. 95, 109 (U.S. 1983) (exception to mootness doctrine available when "the named plaintiff can make a reasonable showing that he will again be *subjected to the alleged illegality*" (emphasis added)). And these cases clearly evade review, as this one has. *See infra* at I.B.

A. There is a reasonable expectation of repetition. The district court applied an erroneous, "perfect storm" standard. App. 12a. When considering this Court's "same controversy" standard, *Murphy*, 455 U.S. at 478, the lower court placed the emphasis on *same* and interpreted this to mean the same *facts* as those surrounding the Crossroads Ad, which the lower court dubbed "this perfect storm." App. 12a. Because "[t]he chances of recurrence of this perfect storm is [sic] small," said the lower court, the mootness exception was "foreclos[ed]." App. 12a.

The proper question was whether there is a reasonable expectation that the same *controversy*, i.e., legal conflict or situation, may occur.[11] While "th[e] perfect storm" of the

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[11] *Murphy* used the term *controversy* in the ordinary legal sense of "[a] disagreement or a dispute" or "[a] justiciable dispute." *Black's Law Dictionary* 331 (7th ed. 1999). The same specific facts are not required for the same disagreement to recur. A classic example is *Roe v. Wade*, 410 U.S. 113 (1973), where Jane Roe's specific 1970 pregnancy could no longer have existed in 1973, when this Court decided the case. *Roe* declared that it was enough if *a* pregnancy might recur:

> [W]hen, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively

Crossroads Ad facts may not recur, there is a reasonable expectation that a "storm" involving the League and the prohibition will recur. The lower court has already acknowledged, as it must, that "'[c]hallenges to rules governing elections are the archetypal cases for application of [the exception].'" App. 12 a (quoting *LaRouche v. Fowler*, 152 F.3d 974, 978 (D.C. Cir. 1998)). But it decided that since this is an as-applied case there must be a "perfect storm" convergence of the precise facts related to the Crossroads Ad. This is wrong.[12]

> denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.'

410 U.S. at 125 (citations omitted). This Court proceeded to make clear that this chance of another pregnancy, not the same pregnancy, is what is required by a "controversy" reasonably likely to recur: "We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable *controversy*, and that the termination of her 1970 pregnancy has not rendered her case moot." *Id.* (emphasis added). As in the present case, the question is whether there is a reasonable likelihood that the same *situation* will recur, not the same facts.

[12]The lower court concedes that under *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974), as-applied challenges *may* be capable of repetition. Mem. Op. at 12 (emphasis in original). But the court anchored its "perfect storm" standard on the idea that an as-applied challenge is "fact specific." *Id.* But in fact, *Storer* was not so grudging in applying the capable of repetition prong in an as-applied election law case, holding that an as-applied election law controversy was capable of repetition even if the same party would not be injured again by the offending law. *Id.* (applying the exception where "no effective relief can be provided to the candidates"). Nor have the supposed idiosyncrasies of an as-applied challenge found by the lower court to be a "perfect storm" been of concern to other courts. At least three Courts of Appeals have held both prongs to be satisfied in an as-applied challenge. *See Belitskus v. Pizzingrilli*, 343 F.3d 632, 649 (3rd Cir. 2003) (finding a "demonstrated probability" of a recurrence of the controversy because it was "reasonable to assume," in an as-applied challenge, that candidates would

This case is not just an as-applied challenge to the Crossroads Ad. It is an as-applied challenge to the electioneering communication prohibition as applied to *genuine grassroots lobbying* of the sort represented by the Crossroads Ad. The League clearly declared that it not only wanted to run the Crossroads Ad, but that it also wanted to run "materially similar ads" during the prohibition period, VC ¶ 13, and it sought "declaratory and injunctive relief permitting CCL [the League] to run both the current grass-roots lobbying Advertisement (Exhibit A) and *materially similar ads in the future*." VC ¶ 15 (emphasis added). The League reiterated this broader as-applied scope and demonstrated the "strong likelihood" that this same situation was likely to recur, VC ¶ 16, so that if (as happened) the lower court denied the preliminary injunction the League could obtain declaratory and injunctive relief, under the exception to the mootness doctrine, that would benefit it the next time the need for broadcast grassroots lobbying arose during a prohibition period.[13] The League met its burden of

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again seek a waiver of filing fees based on indigency); *Pearlman v. Vigil-Giron*, 71 Fed. Appx. 11, 14 (10th Cir. 2003) (challenged ballots were certified and distributed and the election had occurred); *Teper v. Miller*, 82 F.3d 989, 992 (11th Cir. 1996) (holding, in a challenge to contribution limits, that the "'capable of repetition yet avoiding review' exception is particularly appropriate in cases like Teper's presenting 'as-applied' challenges to state law").

[13]Paragraph 16 (emphasis added) demonstrated more than a "reasonable expectation":

> *Regardless of the outcome of the expected Senate cloture vote on S.J. Res. 1 in early June, CCL intends to run materially similar grass-roots lobbying ads falling within the electioneering communication prohibition period before the general election and within the electioneering communication prohibition periods before future primary and general elections in Maine* when there are pending matters in the legislative or executive branch that similarly require referencing a clearly identified candidate for federal office in broadcast communications to the citizens

proving the reasonable expectation prong, and neither the lower court nor the FEC and Intervenors have countered these verified facts. Rather, they relied on the flawed "perfect-storm" analysis.

The League's challenge as applied to grassroots lobbying (not just the Crossroads Ad) does not convert this case into a facial challenge of the sort rejected in *McConnell v. FEC*, 540 U.S. 93, 207 (2003), as the lower court thought. App. 8a. In *WRTL*, 126 S. Ct. 1016, this Court unanimously approved the bringing of just such a challenge as applied to grassroots lobbying, showing that there is no conflict between a challenge on such a basis and the holding of *McConnell*. The League's allegation that it wants to do materially-similar future ads is merely a statement of its future intent, which goes to the question of whether there is a reasonable expectation that the situation at issue here will recur. The lower court was wrong to extract these declarations of intent from their context in the exception to the mootness doctrine and hold them non-justiciable because they were not ripe—as if the League had merely

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of Maine. CCL is concerned about a *range of issues* in addition to laws protecting traditional marriage – such as partial birth abortion, permissive abortion, abortion clinic regulations, parental control of their children's education, regulation of sexual predators, legislation normalizing same sex relations, gambling, limiting the government's power to raise taxes and the freedom to advance its issues in the public forum – that *regularly have and will become issues in the legislative and executive branch*. Because the legislative and executive branches often deal with important legislative and executive branch issues in the periods before elections, there is a *strong likelihood that CCL's need to broadcast grass-roots lobbying ads will again coincide with the electioneering communications blackout periods*. CCL does not have a federal political committee (PAC), and would instead pay for such ads with funds that do not comply with the source and amount limitations that govern PACs.

complained that it wanted to run some ads someday. App. 9a.[14]

Although the "perfect storm" convergence of specific as-applied facts is not required for the mootness exception, most of the facts that the Court recites as needing to converge will actually remain the same in the future or there is a reasonable

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[14]In *WRTL*, this Court specifically approved an as-applied challenge to grassroots lobbying both as to WRTL's 2004 ads and as to grassroots lobbying generally, *see* Jurisdictional Statement (No. 04-1581) at i (setting out both issues) after WRTL specifically called the Court's attention to the fact that the case was being appealed under the exception to the mootness doctrine with the following statement:

> While the 2004 election is past, this case is not moot because WRTL intends to do similar grass-roots lobbying in the future, with a reasonable likelihood that the need will recur during a prohibition period. Amended Verified Complaint for Declaratory and Injunctive Relief ¶ 16. [FN 2] Further, election cases are classic examples of the exception to the mootness doctrine for cases that are capable of repetition yet evading review. [FN 3]
>
> [FN 2] In addition to ongoing judicial filibusters, WRTL has an interest in grass-roots lobbying as to a broad range of currently hot social issues that the legislative and executive branch often deal with in periods before elections, including embryonic stem cell research, cloning, abortion (including partial-birth abortion), fetal pain legislation, Medicare policy, foreign aid policy, nutrition/hydration withdrawal, health-care rationing, assisted suicide, euthanasia, non-discrimination in medical training and practice, and campaign finance reform. *Id.*
>
> [FN 3] *See Norman v. Reed*, 502 U.S. 279, 287-88 (1992); *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1095 n.4 (9th Cir. 2003); *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003); *Florida Right to Life v. Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001); *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 390 n.3 (4th Cir. 2001); *Stewart v. Taylor*, 104 F.3d 965, 969-70 (7th Cir.1997); *New Hampshire Right to Life v. Gardner*, 99 F.3d 8, 18 (1st Cir.1996); *Kansans for Life v. Gaede*, 38 F. Supp. 2d 928, 932 (D. Kan. 1999).

Id. at 7 & nn. 2 and 3.

expectation that they will recur. Here is the court's list, App. 12a (emphasis added):

1. "a speaker that happened to be incorporated";
2. "*intent* on using corporate funds";
3. "*intent* on using broadcast media";
4. "*intent* on mentioning a candidate";
5. "*intent* on . . . doing so within thirty days of that candidate's primary election";
6. reference to Sen. Snowe's action as "[u]nfortunate[]"; and
7. "previously sound[ing] an enthusiastic note in discussing a potential electoral challenge to Senator Snowe."

Preliminarily, three things should be noted. **First**, the lower court leaves out important facts regarding a reasonable expectation that the League will be subject to the same prohibition: (a) there will continue to be regularly recurring federal elections, conventions, and caucuses that trigger prohibition periods; (b) the prohibition periods will span at least ninety days every two years (a fourth of a year), (c) Congress will be in session and an executive will be in office during those prohibition periods, (d) Congress and the executive branch will be making decisions during those prohibition periods, (e) there will continue to be a flurry of important legislative activity during these prohibition periods, especially before the general election,[15] (f) the League

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[15]In *McConnell*, the ACLU provided a summary Chart of "Bills of Interest to the ACLU in the 106th Congress During the 60 Days Prior to the November General Election." Joint Appendix at 622-26, *ACLU v. FEC* (No. 02-1734) (consolidated with *McConnell*) and made the following observations about pre-election legislative activity:

> [E]lection years are often periods of intense legislative activity, as the district court recognized. During the 2002 election cycle, for instance, legislation creating a new federal Department of Homeland Security was under consideration in the midst of the pre-election period. . . . During the fall 2000 elections, dozens of critical legislative issues were pending in Congress during the 60 day general election blackout period. *See*

will still care about a wide range of issues (VC ¶ 16) that regularly come before the legislative and executive branches, (g) the League will still be an ideological, issue-advocacy corporation with a track record of wanting to engage in grass-roots lobbying, and (h) broadcasting media will still offer unique advantages for grassroots lobbying so that the League will continue to want to use broadcasting for grassroots lobbying. Based on these factors neglected by the lower court, there is a reasonable expectation that the League will again want to engage in grassroots lobbying with broadcast media during prohibition periods.

Second, it should be noted preliminarily that the lower court's "perfect storm" facts #1-#5 are elements of the definition of electioneering communication and its prohibition. As such, they are necessarily inherent in any challenge to the electioneering communication prohibition and were clearly present in the effort to gain recognition of constitutional protection for the Crossroads Ad. All of these five facts, and the League's *intent* as to them, were encompassed in the League's declaration that it wants judicial relief to allow it to run "materially-similar ads in the future," VC ¶ 15, and its declaration that "CCL *intends* to run materially similar grass-roots lobbying adds falling within the . . . electioneering communication prohibition periods before future primary and general elections . . . when there are pending matters . . . that similarly require [broadcast grassroots lobbying]." VC ¶ 16 (emphasis

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[Chart]. Thus, it is not unusual for the ACLU's legislative and issue advocacy to be most intense during an election year, especially in the days leading up to the election.

Brief of Appellant at 12-13, *ACLU v. FEC* (No. 02-1734) (consolidated with *McConnell*). A longstanding practice in Congress is to attach riders to appropriation bills, which are considered in the fall prohibition periods. Movement of controversial legislation to prohibition periods may reasonably be expected because less opposition can be generated at such times.

added). So there is no issue as to *intent* regarding these facts.

A **third** preliminary matter has to do with the lower court's facts #6 and #7. These have nothing to do with whether there is a reasonable expectation that the League will again be subject to the prohibition. Neither styling an incumbents' vote unfortunate nor enthusing over potential challengers is an element of the prohibition.

Even assuming arguendo that the League must show a reasonable likelihood that all seven parts of "this perfect storm" will recur, the facts will remain constant in all material ways, as shown next (dealing seriatim with the lower court's facts).

#1 (incorporation). As to the first fact, the League did not just "happen[] to be incorporated." App. 12a. It has been incorporated since 1905. VC Ex. B. The League brought this challenge because it is a corporation and under the prohibition. This will not change.

#2 (corporate funds). This fact will not change because the League is "*intent* on using corporate funds," App. 12a (emphasis added), for its grassroots lobbying. The League's declaration of intent to run materially-similar future ads, VC ¶¶ 15, 16, encompasses using corporate funds.[16]

#3 (broadcast). This fact will not change because the League is "*intent* on using broadcast media," App. 12a (emphasis added), for grassroots lobbying communications. The League's declaration of intent to run materially-similar future

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[16]The League will always intend to use general funds instead of PAC funds for genuine grassroots lobbying because the League does not have a federal PAC, does not want one because of the compliance burdens it would impose, does not plan to organize one, and believes the prohibition is unconstitutional to require the League to have a PAC for grassroots lobbying, and because PAC funds are more difficult to obtain.

ads, VC ¶¶ 15, 16, encompasses using broadcast media.[17]

#4 (mention candidate). This fact will not change because the League is "*intent* on mentioning a candidate," App. 12a (emphasis added), in its grassroots lobbying communications. The League's declaration of intent to run materially-similar future ads, VC ¶¶ 15, 16, encompasses referencing a candidate.[18]

#5 (within prohibition period). This fact will not change because the League is "*intent* on . . . doing [grassroots lobbying communications] within [any applicable prohibition period[19]],"

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[17]Where the need for grassroots lobbying arises on short notice, there is no substitute for broadcasting, and broadcast media have an effectiveness that is unsurpassed by other media (which is the obvious reason why the prohibition targets broadcasting). The League has a track record of using broadcast media for grassroots lobbying, as evidenced by the both the Crossroads Ad and the 2004 Ad, *see supra* at n.4, 13, so while it may also use other media it intends to run broadcast ads again.

[18]The League believes that naming a candidate is necessary to effective grassroots lobbying and so has done so both in the Crossroads Ad and the 2004 Ad, *see supra* n.4, 13, and it will do so in the future. Moreover, the prohibition requires only referencing a candidate somehow, not just the narrower act of mentioning a candidate's name, so even saying, "Call your Senators" without naming them would trigger the prohibition. *See* 11 C.F.R. § 100.29(b)(2) ("refers to a clearly identified candidate" means "unambiguous reference" such as "your Congressman"). Thus, *any* sort of grassroots lobbying will trigger the prohibition because grassroots lobbying, by definition, includes asking people to contact government officials or representatives, who must be identified in some manner.

[19]The lower court employed too specific a level of generality here by focusing on the primary election prohibition period. The League could be subject to the prohibition again "within 60 days before a general election . . . ; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party," 11 C.F.R. § 100.29(a)(2) (App. 23a), or during "[a] special election or a runoff election." *Id.* at § 100.29(b)(4) (App. 24a). There is no reason to limit the

App. 12a (emphasis added) as the need arises. VC ¶ 16. The League's declaration of intent to run materially-similar future ads, VC ¶¶ 15, 16, encompasses running them during a prohibition period.[20]

#6 (stating League's position). This fact will not change because the League intends to state its position on the topic of any grassroots lobbying in future broadcasts. The League's declaration of intent to run materially-similar future ads, VC ¶¶ 15, 16, encompasses stating the League's position on the issue at hand.

#7 (prior enthusing). This fact is even more problematic than #6 because it is not evident from the Crossroads Ad itself. This fact represents the lower court's belief that reasonable expectation of recurrence may be based on external facts having some purported relevance to the League's *intent* in running the ads. However, the League's subjective intent is irrelevant under the free expression right. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (intent and effect test would violate free expression

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analysis to primary elections. There is a reasonable expectation that the League will want to broadcast grassroots lobbying ads during one of these periods as it has declared its intention to do.

The problem with the court's formulation of facts #5-#7 is that driving the analysis to a highly specific level when the level of specificity is immaterial to the question at hand permits the erroneous conclusion that a situation could never recur, when under a proper level of specificity there is a reasonable expectation that it would. If permitted to stand, such a narrow-specificity analysis would allow a court to decide that there is no reasonable expectation that a legal controversy will recur simply by framing the facts narrowly. Neutral criteria are required. The proper question is whether there is a reasonable likelihood that storms will recur, not "*perfect* storms."

[20]Employing the proper standard for the exception to the mootness doctrine, there is a "reasonable expectation" (even a substantial likelihood) that the League will need to broadcast grassroots lobbying communications during a prohibition period given the wide range of issues with which the League is concerned and the fact that grassroots lobbying encompasses both executive and legislative branch actions. VC ¶ 16.

rights). And the right to petition is protected where there is "'a concerted effort to influence public officials *regardless of intent or purpose*." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002) (*quoting Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965)) (emphasis added) (part of the *Noerr-Pennington* line of cases recognizing a high level of protection for the right to petition in a wide range of contexts).

This close look at the lower court's "perfect storm" standard for finding a "reasonable expectation" of repetition underscores the error in fashioning it. Requiring a seven-point convergence of facts for a First Amendment election law claim to be capable of repetition is unprecedented. The cases the lower court cites in support of its novel approach are inapposite. App. 11a-12a. In *People for Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416 (D.C. Cir. 2005), for example (which did not involve elections or campaigns), the court noted that what must be capable of repetition is the alleged wrong and that the nature of the alleged wrong is determined by examining the complaint. The court held that PETA's claim was not capable of repetition because "the legal questions it presents for decision"were essentially limited, by its complaint and arguments, to a claim that its proffered art exhibits were wrongly rejected for display because they satisfied the requirements for acceptance as published and applied. *Id.* at 422-23. As limited by the plaintiff's own pleadings and arguments, its claims were "highly fact-specific." *Id.* at 424.[21] No such limitations are found in the League's complaint, which challenged the electioneering communication prohibition as applied to grassroots lobbying of the sort represented by the Crossroads Ad. The lower court, not

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[21] The court found the controversy "highly fact specific" because "PETA thinks the decision turns on . . . what design criteria . . . the Commission actually employed, whether PETA's [sponsorship] put it on a different track than [the other] artists, and whether . . . the rejection of PETA's designs constituted content or viewpoint discrimination . . . ." *Id.* at 423.

the League, tried to make the claim "highly fact-specific."

Moreover, if the lower court's "perfect storm" of facts accurately reflected the D.C. Circuit's standard for determining whether a First Amendment election claim was capable of repetition (which it does not), that Circuit's standard would be squarely at odds with at least one other Circuit. In an as-applied challenge[22] to an Indiana statute requiring "adequate notice" of the identity of persons paying for express advocacy communications, the Seventh Circuit overturned the lower court's holding of mootness based on the plaintiff's failure to run for office again or prosecute his case: "A candidate plaintiff no more has a duty to run in every election in order to keep his suit alive than an abortion plaintiff has a duty to become pregnant again at the earliest possible opportunity in order to keep her suit alive." *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003). The present lower court would apparently require that, in addition to running for office in the next election, there must also be a reasonable expectation that several more specific details of the candidate's campaign would recur. Such additional specific requirements are at odds with the more general requirements of cases capable of repetition yet evading review.

B. These cases evade review. The lower court's answer to the problem of ever getting judicial review of the sort of as-applied grassroots lobbying challenge to the prohibition that this Court approved in *WRTL*, 126 S. Ct. 1016, is to "bring a lawsuit more than a year in advance of an election if [the corporation] had concrete plans to broadcast within sixty days of the election a specific advertisement, paid for with corporate funds, that mentioned a declared candidate." App. 13a. A year is a long time, when it comes to knowing what the future holds, but an exceedingly short time for getting full judicial review of

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[22]No Court of Appeals employs anything approaching the "perfect storm" standard in the facial challenges that are common in this area of law.

a legal challenge.

How is the League to know what the legislative or executive branches will be doing a year from now? How may it know now what might then touch on one of the League's topics of interest and cause the League to want to broadcast grassroots lobbying ads? The court provides no answer. It is unlikely that the court knows with any precision what it will be doing a year from now, just as it is unlikely that this Court knows with much specificity what cases it will be considering a year from now. The executive branch may have goals for what it wants to be doing a year from now, but there are too many known and unknown variables to know a year in advance how initiatives will actually fare. Legislative branch leaders also may have agendas that they would like to advance, but likewise cannot know how the vicissitudes of politics will affect their plans.

If executives and legislators don't know what they will be doing a year from now, how is the League to know what grassroots lobbying it will want to do a year from now? Have crystal balls become reliable? Has time travel been invented?

Even if the League thought that it knew that an event would occur a year from now that would require grassroots lobbying, why would it plan the text of a grassroots lobbying ad a year in advance? Who would spend the money that far ahead for an ad agency to create text when things might well change between now and then so that the ad might not be needed or it might require alteration and the money would have been wasted? And wouldn't it be unwise to do an ad this early, when it might be a far better ad nine months from now when more is known about the context of the grassroots lobbying effort, such as what arguments others are making or what themes should be reinforced, what should be refuted? And given the opposition's endless-loop efforts to prevent the court from reaching the merits of an as-applied challenge, *see* Part II.D, it is certain that they would claim that a lawsuit filed a year in advance as the

lower court suggests would be challenged as lacking ripeness for the same reasons that would make it unwise to write an ad a year in advance—things change, things are unpredictable.

The lower court insists that the year-in-advance lawsuit "would be ripe and stand a strong chance of gaining appellate review in light of the Act's [expedition requirement]." App. 13a.[23] The ripeness statement is plainly dictum, as no such case was before the court, but it seems unlikely that if confronted with an actual year-in-advance grassroots lobbying ad challenge that it would hold that the case is ripe.

Be that as it may, the other grassroots lobbying challenge in the same district court—subject to BCRA's expedition requirement—demonstrates conclusively that a year is not enough time. In that case, *WRTL*, 126 S. Ct. 1016, this Court unanimously decided that *McConnell v. FEC*, 540 U.S. 93 (2003), did not preclude a constitutional challenge to the prohibition as applied to grassroots lobbying (both as to WRTL's 2004 ads and as to genuine grassroots lobbying generally) and remanded the case to this district court on January 23, 2006. As the case had already been in existence for many months before going to this Court and was fully briefed on cross-motions for summary judgment before the district court dismissed that case, WRTL filed a motion, on January 24, 2006, to reinstate and expedite consideration of the existing summary judgment motions, reminding the district court of the statutory duty to expedite. No. 1:04-cv-01260, Doc. #53 (available by PACER).

The district court took until April 17, 2006, to deny the motion to reinstate, at which time it issued a discovery and

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[23] It should be noted that BCRA's "Judicial Review" provision, requiring that cases be filed in the lower court, a three-judge panel, expedition and advancement on the docket, expires at the end of 2006 unless a plaintiff "elects" to bring its case under that provision. *See* BCRA § 403(d), 116 Stat. at 114.

briefing schedule with oral argument on new cross-motions for summary judgment on September 18. Doc. #69. At the time of the present writing in late October there is no decision from the district court on these cross-motions. Thus, even though the *WRTL* case had a running headstart because it was filed on July 28, 2004, Doc. #1, from the time this Court issued its January 23 opinion to the present approximately nine months have elapsed without a decision. Even if the district court issues its ruling on summary judgment by the end of October, that leaves only three months in this Court for briefing, oral argument, consideration, and drafting of a ruling in order to get all done within a year. Although the League lacks the prescience to know what will happen a year from now, it can easily see that the lower court's one-year resolution time-line is not realistic.[24]

In the real world, the need for grassroots lobbying generally arises rapidly, as it did in the present case.[25] Even with mandated expedition, courts do not resolve such cases in a year (even if that were a sufficiently short length of time, which it is

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[24]In fact, considering the full scope of the expedited *WRTL* case (from July 2004 to present), it is fair to say that a case like the present can take three years or more years to fully litigate, especially with all the "endless loop" arguments made by Defendants, as discussed *infra* at Part II.D.

[25]The *WRTL* case also provides an excellent example of how quickly the need for grassroots lobbying often arises. In that case, WRTL moved on October 25, 2006, for a preliminary injunction to permit broadcasting a genuine grassroots lobbying ad concerning the Child Custody Protection Act ("CCPA"). Doc. #95. Injunctive relief was required because the CCPA Ad would also be an electioneering communication. The motion was denied. Doc. #113. For present purposes, the timing is important. According to the unrebutted *Fourth Affidavit of Barbara L. Lyons* (Doc. #95, Attach. #1), WRTL received an "Urgent Congressional Alert" from the National Right to Life Committee on September 22, 2006, indicating that there was a problem with finalizing the CCPA (which had passed both houses of Congress by large margins in late July 2006) that would come to a vote on invoking cloture in late September 2006. There is no one-year opportunity for full litigation in such a situation—only a matter of days.

not). These cases evade review and fit the mootness exception, but this Court should not simply reverse the lower court on that issue and remand this case.

II. A Grassroots Lobbying Exception Is Required.

This Court should decide the underlying merits of this case, with a rule of general applicability, for several reasons.[26]

A. First, although this Court highlighted in *WRTL* the FEC's authority to provide by rule a grassroots lobbying exception, 126 S. Ct. 1016, the FEC refuses to do so. In 2002, it declined to make a rule even though Sen. McCain and other BCRA prime sponsors (present intervening defendants) proposed a rule allowing grassroots lobbying that they said was fully within the FEC's authority. 67 Fed. Reg. 65190, 65200-02.[27] On February

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[26]A fuller discussion of the merits issue is in the League's Jurisdictional Statement (No. 05-1447) for the appeal of the lower court's denial of the preliminary injunction in this matter and in the Jurisdictional Statement in *WRTL*. 126 S. Ct. 1016 (No.04-1581). Both briefs are available at http://www.jamesmadisoncenter.org. The *WRTL* merits briefs develop the arguments further and are available on this Court's own website.

[27]The BCRA prime sponsors saw the difference between electioneering and grassroots lobbying, proposing to the FEC the following exception to the prohibition on electioneering communications:

> The term "electioneering communication" does not include any communication that:
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> ****
>
> (x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; and (iii) the communication refers to the candidate only by use of the term "Your Congressman," "Your Senator," "Your Member of Congress" or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any

16, 2006, a Petition for Rulemaking was filed by counsel for the Chamber of Commerce of the United States, OMB Watch, the AFL-CIO, the National Education Association, and the Alliance for Justice.[28] The FEC "decided not to initiate a rulemaking in

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political party.

(B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy.

Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords at 10 (copy on file with authors) (attached to Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Ms. Mai T. Dinh of the FEC (Aug. 23, 2002) (copy on file with authors). Both documents are available at the FEC's website, http://www.fec.gov/law/RulemakingArchive.shtml (select "Electioneering Communications" then "Comments on This Rulemaking").

[28]This broad-spectrum group offered a useful proposal for defining a grassroots lobbying exception to the electioneering communications prohibition. In response, the FEC published Notice 2006-4, entitled "Rulemaking Petition: Exception for Certain 'Grassroots Lobbying' Communications From the Definition of 'Electioneering Communication." 71 Fed. Reg. 13557. The petition asked for an expedited rulemaking

> to revise 11 C.F.R. 100.29(c) to exempt from the definition of "electioneering communication" certain "grassroots lobbying" communications that reflect all of the following principles: 1. The "clearly identified federal candidate" is an incumbent public officeholder; 2. The communication exclusively discusses a particular current legislative or executive branch matter; 3. The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so; 4. If the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter; 5. The communication does not refer to an election, the candidate's candidacy, or a political party; and 6. The communication does not refer

response to the Petition at this time." 71 Fed. Reg. 52,795. On August 28, 2006, a FEC commissioner proposed adopting an interim rule similar to the broad-coalition rule to govern the period before the November 2006 election and beyond while a rulemaking was pursued. On August 29, 2006, the FEC voted not to adopt any interim rule,[29] in part because the lower court and this Court might provide "guidance" for possible later FEC action. Audio Recording (available at www.fec.gov). This position was urged by the Office of General Counsel in its proposed Notice of Disposition. *See* http://www.fec.gov/agenda/2006/mtgdoc06-57.pdf (Agenda Doc. 06-57). At the same time, the FEC Office of General Counsel has vigorously sought to avoid any ruling on the merits here and in *WRTL* that would provide such guidance.

B. In *WRTL*, this court provided the district court the opportunity to consider the merits "in the first instance," 126 S. Ct. at 1017, but to date the district court has provided this Court no assistance in framing a rule protecting First Amendment rights in the grassroots lobbying context. Even though this Court unanimously and expeditiously remanded *WRTL* for a decision on the merits, the district court in the present case has

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to the candidate's character, qualifications or fitness for office.

While the League does not believe that this rule goes as far as the Constitution extends protection to grassroots lobbying, it provides a useful definition that balances the concerns of all sides and provides a workable test. Counsel in the *WRTL* case even offered to settle that challenge if the FEC would adopt this rule, which it refused to do.

[29]Audio Recording of FEC Open Meeting Agenda, Aug. 29, 2006, available at http://www.fec.gov/agenda/2006/agenda20060829.shtml. The FEC's complete rule-making file is available at http://www.fec.gov/law/law_rulemakings.shtml#lobbying. The Interim Rule proposed by FEC Commissioner van Spakovsky was similar to the rule requested by a broad-spectrum coalition of issue-advocacy groups. See "Rulemaking Petition: Exception for Certain 'Grassroots Lobbying' Communications From the Definition of 'Electioneering Communication.'" 71 Fed. Reg. 13557.

again avoided the merits, this time based on a misapplication of the mootness exception (even though the exception was expressly identified to this Court in *WRTL* as the jurisdictional basis of the appeal, *see supra* at n.6, 14). Such evasion of the merits provides this Court no assistance. Given that this district court has twice dismissed a grassroots lobbying challenge, a better course now would be to consider the merits of this case. Perhaps the panel of the district court in the *WRTL* case will provide some guidance in formulating a proper rule for a grassroots lobbying exception, but that is uncertain because it has been asked to dismiss that case based on the same flawed mootness argument. The best course would be for this Court to decide the merits of this case and if the *WRTL* panel provides a timely decision consider the two cases together on appeal. That would provide this Court with a broad, differing fact base for its consideration of the merits.

C. These long-delayed grassroots lobbying challenges are of great public importance as shown by the broad-spectrum coalition representing unions and corporations that petitioned for rulemaking, *see supra* at 25, and by the numerous amici curiae that filed briefs in *WRTL*, 126 S. Ct. 1016. The people's public interest groups have argued for an exception for grassroots lobbying since the 2003 briefing in *McConnell*. 540 U.S. 93. Since then, two election cycles have come and gone without a ruling on whether the government can prove narrow tailoring to a compelling interest as applied to the sovereign people's rights to petition (not considered in *McConnell*), to associate in incorporated and union advocacy groups, and to express themselves in the core functioning of a representative republic.

D. Further delay in deciding the merits of this case, or a too-narrow decision, would be unjust to the small, nonprofit citizen groups that have dared to step forward and bear the burden of litigation in order to vindicate their rights. While the burden of litigation is an ever-present reality of our legal system, where a

state actor violates constitutional rights Congress has provided that a prevailing party may recover its attorneys fees. 42 U.S.C. § 1983. Congress has provided no such fee-shifting arrangement for federal laws and regulations, while providing the FEC Office of General Counsel and the Solicitor General with ample funds for the numerous attorneys that they have assigned to these grassroots lobbying challenges. The district court has permitted intervention (over Article III objections), and the Intervenors enjoy the full funding of the campaign finance reform lobby, which has also deployed numerous counsel. The numerous motions and extensive discovery imposed by defendants have created a substantial litigation burden, which fact counsels against a narrow merits decision.[30] A rule of general applicability is required so that citizen groups will not have to carve out, through multiple encounters with scorched-earth litigation, the outlines of an exception for genuine grassroots lobbying. Very few have been willing to step forward and shoulder the financial and extensive discovery burdens of

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[30]While space limitations preclude a full discussion of the tactics employed by defendants to impose heavy litigation burdens and deprive these citizen groups of their day in court, a scan of the dockets in both the present case and *WRTL* (on PACER) provides a birds-eye view of their efforts (although with only little detail on discovery). In what may be styled "endless-loop" arguments, defendants in *McConnell*, 540 U.S. 93, insisted that no as-applied situations (such as grassroots lobbying) be considered in that facial challenge and then insisted that *McConnell* precluded as-applied challenges, which argument was fully briefed in *WRTL*, 126 S. Ct. 1016, wherein this Court unanimously rejected this too-soon-then-too-late ploy. In the present case (and in *WRTL*), defendants have vigorously resisted a preliminary injunction until the opportunity for grassroots lobbying is past, and then they have insisted that the matter is moot and not within the mootness exception. They have also insisted that the statement of plans to do materially-similar future ads is not ripe (although these statements of future plans were addressed only to the reasonable expectation of recurrence requirement in the mootness exception). This endless loop of never reaching the merits must also be rejected.

bringing a challenge. Nor should they be required to do so in order to vindicate their rights under the First Amendment, which are supposed to be guaranteed to them against Congressional interference. U.S. Const. amend. I ("Congress shall make no law . . . .").

Conclusion

For the foregoing reasons, the Court should note probable jurisdiction, expedite and advance this case on the calendar, and hold (1) that this case is within the exception to the mootness doctrine for matters capable of repetition yet evading review, (2) that the prohibition is unconstitutional as applied to the League's proposed advertisement and materially-similar future advertisements, and (3) establish an appropriate rule of general applicability to protect genuine grassroots lobbying.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC., Plaintiff,	) Civil Action No. 06-0614
v.	) (JWR, LFO, CKK)
	) (Three-Judge Court)
FEDERAL ELECTION COMMISSION, Defendant,	)
and	)
JOHN MCCAIN, RUSSELL FEINGOLD, CHRISTOPHER SHAYS, MARTIN MEEHAN, AND TOM ALLEN, Intervenor-Defendants.	)

MEMORANDUM OPINION

Plaintiff Christian Civic League of Maine, Inc. (the "League") seeks declaratory and injunctive relief in support of its efforts to broadcast (1) a particular political advertisement (the "Crossroads advertisement") in advance of a June 2006 United States Senate vote and (2) "materially similar" advertisements in the future. Verified Complaint ¶ 16, Prayer for Relief (filed Apr. 3, 2006). Defendant Federal Election Commission (the "Commission"), has moved to dismiss the League's claims as "not ripe" and/or "too speculative and hypothetical to be justiciable under Article III" insofar as they pertain to any

circumstances other than those surrounding the efforts of the League to broadcast the Crossroads advertisement. Commission's Motion at 1 (filed June 12, 2006). The intervenor-defendants, certain legislators (the [*2] "Legislators"), have moved for partial judgment on the pleadings on the same aspects of the League's claims, for the same reasons. The League opposes these motions.

Additionally, the court has suggested that the balance of the case – i.e., the claims of the League insofar as they do pertain to the circumstances surrounding its efforts to broadcast the Crossroads advertisement – may be moot and not saved by the "capable of repetition, yet evading review" exception to that doctrine. See June 23, 2006 Order. The Legislators have agreed that this aspect of the League's claims "does . . . appear moot . . . . [and] not capable of repetition," Legislators' Response at 2 (filed July 7, 2006); the Commission has stated that the court's suggestion raises a "close question," Commission's Response at 1 (filed July 7, 2006); and the League has opposed the suggestion.

We conclude that the League's claims are (1) not ripe and/or too speculative and hypothetical to be justiciable insofar as they pertain to any circumstances other than those surrounding the efforts of the League to broadcast the Crossroads advertisement and (2) moot and not saved by the "capable of repetition, yet evading review" exception to that doctrine insofar as they do pertain to the circumstances surrounding the League's efforts to broadcast the Crossroads advertisement. Accordingly, an accompanying order grants the pending partial motions to dismiss and for judgment on the pleadings and otherwise dismisses the League's remaining claims as moot.

I. BACKGROUND

An earlier opinion in this case (in which we denied the League's motion for a preliminary injunction) provides the factual and legal background to this dispute. *See* May 9, 2006

Memorandum Opinion. Briefly, the League – a self-styled "nonprofit, nonstock . . . ideological" [*3] corporation that engages in some business activity, Verified Complaint ¶¶ 20, 22 – sought to use general corporate funds to broadcast the Crossroads advertisement in advance of a June 2006 Senate vote. The Crossroads advertisement identified Senator Olympia Snowe by name; Senator Snowe was a candidate in a primary election scheduled for June 13, 2006. The League brought suit on First Amendment grounds in recognition of the fact that the Federal Election Communications Act, as amended by the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, and codified at 2 U.S.C. § 431 *et seq.* (the "Act"), appeared to prohibit it from broadcasting the Crossroads advertisement in the described circumstances. (The Act prohibits corporations from using general corporate funds for "electioneering communication[s]," 2 U.S.C. § 441b(a), (b)(2), defined as any "broadcast, cable, or satellite" communication, issued within thirty days of a federal primary election or sixty days of a general federal election (the "blackout period"), that "clearly identifie[s]" a candidate in that election and "target[s]" the relevant electorate, 2 U.S.C. § 434(f)(3)(A)(i)).

The Supreme Court has previously rejected a facial challenge to the relevant provision of the Act (the "electioneering communications provision"). *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 189-94, 203-11 (2003). In *McConnell*, the Court recognized that the electioneering communications provision extends to prohibit some "issue advertis[ements]." 540 U.S. at 126-32, 189-94, 203-05. The Court concluded, however, that that provision is tailored sufficiently narrowly to meet a compelling governmental interest and to survive constitutional scrutiny. *See id.* at 193, 204-06. As the Court noted: "[C]orporations and unions may finance genuine issue ads during [the blackout periods] by simply avoiding any specific reference to federal candidates, or

in doubtful cases by paying for the ad from a segregated fund." *Id.* at 206. [*4]

Subsequently, in *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 126 S. Ct. 1016, 1018 (2006), the Court clarified that its decision in *McConnell* did not pose an absolute bar to as-applied challenges to the electioneering communications provision; i.e., the First Amendment might require the exemption of particular advertisements, in particular circumstances, from the Act's definition of an electioneering communication. The League argues that the Crossroads advertisement (as well as "materially similar" future advertisements) requires such an exemption.

On May 9, 2006, we denied the League's motion for a preliminary injunction. The League did not run the Crossroads advertisement during the blackout period in advance of the June 13, 2006 primary. *See* League's Response to Court's Suggestion of Mootness at 5 (filed June 30, 2006). In early June 2006, the Senate voted on the legislation to which the Crossroads advertisement pertained. *See* Joint Report of the Parties at 1 (filed June 15, 2006).

II. ANALYSIS

The League's claims with respect to the Crossroads advertisement are moot. Yet, the League argues that its lawsuit should proceed nonetheless because (1) its claims reference not only the Crossroads advertisement but also "materially similar" advertisements that it might broadcast in the future, Verified Complaint ¶ 16, and/or (2) the Crossroads advertisement portion of the case qualifies for the "capable of repetition, yet evading review" exception to the mootness doctrine. We disagree on both issues.

A. The Non-Crossroads Claims.

Insofar as the League's claims pertain to any circumstances other than those surrounding its efforts to broadcast the

Crossroads advertisement (the "non-Crossroads claims"), those claims [*5] are not justiciable because they are not ripe and/or are too speculative and hypothetical. The League bears the burden of clearly alleging and ultimately proving that the non-Crossroads claims are justiciable. *See Renne v. Geary*, 501 U.S. 312, 316 (1991) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.") (quotation marks omitted). Here, far from establishing such justiciability, the League has admitted that it has no current plans to broadcast any advertisements about any issue.[1] First, at deposition, its Executive Director testified:

> Q: . . . . Do you have any current plans to run ads on radio or TV about the federal marriage amendment other than the Crossroads ad?
>
> A: No.
>
> Q: Do you have any plans to run ads on radio or TV about anything other than the Crossroads ad?
>
> A: No.
>
> . . . .
>
> Q: Paragraph 16 [of the League's Verified Complaint] says that [the League] plans to run materially similar ads after mid June on a range of other issues; correct?
>
> A: Uh-huh. Uh-huh.
>
> Q: Is that a correct statement of [the League]'s plans today?

---

[1] In resolving a jurisdictional issue on a motion to dismiss or motion for judgment on the pleadings, "where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *See Herbert v. National Academy of Sciences*, 974 F.2d 192 (D.C. Cir. 1992).

A: Yes.
Q: Can you describe those plans?
A: No.
Q: Why not?
A: Because it's not beyond a simple plan or intention to do that. [*6]

. . . .

Q: Is there any specific issue you can tell me that [the League] plans to run a radio or TV ad on in the future other than the Crossroads ad?
A: No. We have no other script written. We have no other issues selected for future campaigns.

Commission's P.I. Opp. (filed Apr. 17, 2006), Ex. A (Apr. 2006 Deposition of Michael Heath at 74-75, 82-83). The League's attorney forthrightly confirmed this lack of plans in a May 22, 2006 report to the court and at a June 5, 2006 status conference. *See* Joint Report at 8 (filed May 22, 2006) ("no concrete plans to run ads"); June 5, 2006 Status Conference Transcript at 14 ("We have no current plans to do an ad . . . .").

"Article III . . . confines . . . [the courts] to resolving real and substantive controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quotation marks omitted); *see also International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954) ("Determination of the . . . constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function."). This is no less true in cases involving First Amendment arguments: "The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance." *Golden v. Zwickler*, 394 U.S. 103,

110 (1969). "Even the 'chilling' of the most protected First Amendment rights of free speech does not create a case or controversy without a 'specific present objective harm or a threat of specific harm.'" *National Conference of Catholic Bishops v. Smith*, 653 F.2d 535, 539-40 (D.C. Cir. 1981) (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)). [*7]

Accordingly, to be justiciable, the League's challenge to the constitutionality of the Act's electioneering communications provision must arise from a dispute that is "credible and immediate, and not merely abstract or speculative." *Navegar, Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997); *see also id.* (courts must avoid "entangle[ment] in abstract disagreements") (quotation marks omitted). The dispute must be of "'sufficient immediacy and reality,'" *Davis v. Liberty Mut. Ins. Co.*, 871 F.2d 1134, 1137 n.3 (D.C. Cir. 1989) (quoting *Golden*, 394 U.S. at 108-09), and not based on a "'hypothetical state of facts,'" *Federal Express Corp. v. Air Line Pilots Ass'n*, 67 F.3d 961, 963-64 (D.C. Cir. 1995) (quoting *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 241 (1937)).

In *Renne v. Geary*, 501 U.S. 312 (1991), the Supreme Court held non-justiciable (as unripe) a First Amendment challenge to a California constitutional provision that barred political parties from endorsing candidates for non-partisan offices. In so ruling, the Court relied on the plaintiffs' failure to allege a present intention to endorse any particular candidate or that any particular candidate desired to publicize such an endorsement. *See Renne*, 501 U.S. at 321. The Court further relied on the lack of an adequate factual record regarding "the nature of the endorsement, how it would be publicized, or the precise language [of the endorsement]." *Id.* at 321-22. So too here. The League has admitted that it lacks a present intention to broadcast any particular advertisement; nor has it alleged the interest of any group in having it broadcast such an advertisement. And nor has the League, necessarily, developed any factual record

regarding, for example, the text of any such future advertisement; where, when, and how the advertisement would be broadcast; and/or the alternative funding opportunities that might be available to the League in the given, hypothetical situation. [*8]

The League offers three counter-arguments in support of the justiciability of the non-Crossroads claims. First, it argues that it has alleged a sufficiently concrete dispute by asserting that any future advertisement would be "materially similar" to the Crossroads advertisement. *See* League's Opp. at 5-9 (filed June 30, 2006) (quoting Verified Complaint ¶ 16). The League explains that "materially similar, by definition, means that the ads' text, placement[,] and timing would put them in contravention of the electioneering communication prohibition, just as the text, placement, and timing of the Crossroads ad put it in contravention of the electioneering communication prohibition." *Id.* at 6-7. Under this logic, however, the non-Crossroads portion of the League's claims would simply devolve into a facial challenge to the relevant statutory provision – a challenge that the Supreme Court has already rejected. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 189-94, 203-11 (2003).

The League next relies on the decision of the United States Court of Appeals for the District of Columbia in *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997). *See* League's Opp. at 2-4 (filed June 30, 2006). As the League notes, that decision found adequately justiciable a pre-enforcement challenge to the constitutionality of a particular statute. *See Navegar*, 103 F.3d at 999-1001. In *Navegar*, however, the disputed statute, which was newly enacted, prohibited the manufacture of certain weapons of which the plaintiff was the only manufacturer. *See id.* at 1000. Additionally, federal agents had visited the plaintiff-manufacturer on the very day of the statute's enactment to inventory the plaintiff's already-manufactured weapons, which were grandfathered under the statute. *See*

id. Here, the relevant provision of the Act does not specifically target the League, and federal agents (e.g., Commission staff) have not taken special notice of League activities. As such, the present case [*9] is more analogous to the balance of the *Navegar* decision – which part of the decision finds nonjusticiable challenges by the plaintiff-manufacturer to certain other, more generally applicable statutory provisions. *See id.* at 1001-02.

Finally, the League argues that it faces a non-speculative threat of prosecution because it has alleged a desire to broadcast advertisements that, by definition, would violate the relevant provision of the Act. *See* League's Opp. at 9-12 (filed June 30, 2006). The League's claims are speculative, however, in that it has no current plans to run any particular advertisement in any particular circumstances. This leaves the threat of enforcement speculative, for many of the reasons discussed above. *See, e.g., National Conference*, 653 F.2d at 539-40.

What the League really seeks via its non-Crossroads claims is for the court to promulgate a rule exempting all "grass roots lobbying" – a phrase the League never defines – from the Act's electioneering communications provision.[2] This court, however, decides present disputes based on particular facts – and especially so where faced with an as-applied challenge, as here. Absent a concrete dispute, this court lacks jurisdiction.[3]

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[2]The Commission has recently considered a grassroots lobbying exemption to the Act's electioneering communications provision. See Audio Recordings Attached to Agenda Items 3&4 at www.fec.gov/agenda/2006/agenda20060829.shtml (visited Sept. 7, 2006). Noting it judicially, we deem it of no consequence here.

[3]The Commission offers an advisory opinion process by which it will offer parties, within sixty days, a ruling on whether it considers that the broadcast of a particular advertisement, in the context of particularly described circumstances, would run afoul of the Act's electioneering communications provision. See 2 U.S.C. § 437f; *see also* www.fec.gov/

B. The Crossroads Claims.

Insofar as the League's claims do pertain to the circumstances surrounding its efforts to [*10] broadcast the Crossroads advertisement (the "Crossroads claims"), those claims are moot and not saved by the capable of repetition yet evading review exception to that doctrine. Those claims are moot in that the court could not order any effectual relief with regards to the Crossroads advertisement: because the Senate vote referenced in that advertisement has come and gone, injunctive or declaratory relief regarding the advertisement is no longer of use to the League. Nor are the Crossroads claims capable of repetition in that those claims were tied to the specific circumstances of the Crossroads advertisement. And, to any extent to which those circumstances reasonably may repeat (e.g., by defining those circumstances in the most general of terms), they do not necessarily evade review.

1. The Crossroads Claims Are Moot.

The Crossroads claims are moot. A claim is moot where a court, on that claim, "cannot grant 'any effectual relief whatever.'" *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)); *see also Pharmachemie B.V. v. Barr Labs., Inc.*, 276 F.3d 627, 631 (D.C. Cir. 2002) ("A case is moot if events have so transpired that [a court] decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.") (quotation marks omitted). Here, the occurrence of the June 2006 Senate vote on the relevant legislation leaves the court without power to provide effectual relief with regard to the Crossroads advertisement; the window of time in which the League could run that advertisement has expired. "A federal court has no 'power to render advisory

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pages/brochures/ao.shtml (visited Sept. 7, 2006).

opinions [or] . . . decide questions that cannot affect the rights of the litigants in the case before them.'" *Alliance for Democracy v. Federal Election Comm'n*, 335 F. Supp. 2d 39, 42 (D.D.C. 2004) (quoting *National Black Police Ass'n v. District of Columbia*, [*11] 108 F.3d 346, 349 (D.C. Cir. 1997)).

2. The Crossroads Claims Do Not Qualify for the "Capable of Repetition, Yet Evading Review" Exception to the Mootness Doctrine.

Nor do the Crossroads claims qualify for the "capable of repetition, yet evading review" exception to the mootness doctrine; those claims are neither "capable of repetition" nor "evad[e] review." The Supreme Court has recognized the "capable of repetition, yet evading review" exception at least since its decision in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). The exception remains applicable, however, "only in exceptional situations," *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), and only upon the satisfaction of "both [of its] prongs," *Pharmachemie*, 276 F.3d at 633. "To invoke this exception, petitioners have the burden to demonstrate that [its requirements are met]." *Public Utils. Comm'n of the State of Calif. v. Federal Energy Regulatory Comm'n*, 236 F.3d 708, 714 (D.C. Cir. 2001); *accord Southern Co. Servs., Inc. v. Federal Energy Regulatory Comm'n*, 416 F.3d 39, 43 (D.C. Cir. 2005).

In order for the League to demonstrate the applicability of the "capable of repetition" prong, it must establish a "reasonable expectation or a demonstrated probability that the *same* controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (quotation marks omitted) (emphasis added). The Supreme Court has not held that a "mere physical or theoretical possibility" of repetition is sufficient to establish the exception's applicability because, if it were, "virtually any matter of short duration would be reviewable." *Id.* The alleged wrong at issue

"must be defined in terms of the precise controversy it spawns." *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 422-23 (D.C. Cir. 2005). Even so defined, an as-applied challenge to a statute *may* be [*12] "capable of repetition" for purposes of the exception. *See Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974). "Challenges to rules governing elections are the archetypal cases for application of [the capable of repetition, yet evading review] exception." *LaRouche v. Fowler*, 152 F.3d 974, 978 (D.C. Cir. 1998). The exception, however, does not automatically apply in such a circumstance. *See, e.g., Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187-88 (1979) (dismissing as moot challenge to authority of Chicago Board of Election Commissioners to enter settlement agreement regarding ballot access signature requirement). Here, the Crossroads claims are not "capable of repetition." The Crossroads claims constitute an as-applied, i.e., fact-specific, challenge to the relevant provision of the Act. As such, those claims depended on the confluence of specifics, including: a speaker that happened to be incorporated, a speaker intent on using corporate funds (rather than political action committee funds) to fund its proposed speech, a speaker intent on using broadcast media to publish its speech, and a speaker intent on mentioning a candidate for federal office in its proposed speech and doing so within thirty days of that candidate's primary election. In our opinion denying the League's preliminary injunction motion, we noted the relevance of additional, "as-applied" facts, including the League's reference in its proposed speech to a past legislative action of Senator Snowe as "[u]nfortunate[]" and the fact that the League had previously sounded an enthusiastic note in discussing a potential electoral challenge to Senator Snowe. *See* May 9, 2006 Memorandum Opinion at 10. The chances of recurrence of this perfect storm is small, thereby foreclosing application of the "capable of repetition, yet evading review" exception. *See*

Public Utils. Comm'n, 236 F.3d at 714 ("The Supreme Court has . . . required not [*13] merely a physical or theoretical possibility of recurrence but a reasonable expectation if not a demonstrated probability that petitioners will be subject to the same action.") (quotation marks and citation omitted); *People for the Ethical Treatment of Animals*, 396 F.3d at 424 ("To conclude that a dispute like this would arise in the future requires us to imagine a sequence of coincidences too long to credit.").

The League counters that a ruling that its Crossroads claims are not capable of repetition would prevent similar claims from ever gaining meaningful review: the claims routinely will be mooted before full appellate review. This is not necessarily true – to any extent to which the League's claims are capable of repetition, they will not necessarily evade review. A plaintiff could bring its lawsuit much earlier than did the League. A corporate plaintiff, for example, might bring a lawsuit more than a year in advance of an election if it had concrete plans to broadcast within sixty days of the election a specific advertisement, paid for with corporate funds, that mentioned a declared candidate. Such a lawsuit would be ripe and stand a strong chance of gaining full appellate review in light of the Act's requirement that the judiciary expedite consideration of such challenges. *See* Act, § 403(a)(4) ("It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of [any action challenging the constitutionality of any provision of the Act]."); *cf. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (eighteen months an inadequate period of time for complete judicial review, in context of a statute that did not require expedition).

III. CONCLUSION

For the foregoing reasons, an accompanying order grants the pending motions and [*14] otherwise dismisses the League's claims as moot.

/s/
Judith W. Rogers
UNITED STATES CIRCUIT JUDGE

/s/
Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

/s/
Colleen Kollar-Kotelly
UNITED STATES DISTRICT JUDGE

DATED: September 27, 2006

[Headers omitted: state "Document 51 Filed 09/27/2006"]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC., Plaintiff,	) Civil Action No. 06-0614
v.	) (JWR, LFO, CKK)
	) (Three-Judge Court)
FEDERAL ELECTION COMMISSION, Defendant,	)
and	)
JOHN MCCAIN, RUSSELL FEINGOLD, CHRISTOPHER SHAYS, MARTIN MEEHAN, AND TOM ALLEN, Intervenor-Defendants.	)

ORDER

For the reasons explained in an accompanying memorandum opinion, it is this 27th day of September, 2006 hereby:

ORDERED: that Intervenor-Defendants' motion for partial judgment on the pleadings [docket number 39] is GRANTED; and it is further

ORDERED: that Defendant's motion to dismiss in part [docket number 37] is GRANTED; and it is further

ORDERED: that, Plaintiff having failed to show cause why the balance of its claims [*2] should not be dismissed as moot, all remaining claims are DISMISSED as moot.

/s/
Judith W. Rogers
UNITED STATES CIRCUIT JUDGE

/s/
Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

/s/
Colleen Kollar-Kotelly
UNITED STATES DISTRICT JUDGE

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2 U.S.C. § 434(f)(1)-(3)

§ 434. Reports

* * *

(f) *Disclosure of electioneering communications.*

(1) *Statement required.* Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $ 10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) *Contents of statement.* Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) *Electioneering communication.* For purposes of this subsection –

(A) *In general.*

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which –

(I) refers to a clearly identified candidate for Federal office;

(II) is made within –

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political

party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) *Exceptions.* The term "electioneering communication" does not include –

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consis-

tent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)).

(C) *Targeting to relevant electorate.* For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons –

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

2 U.S.C. § 441b(a)-(b)(2)

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contri-

bution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 12(h) of the Public Utility Holding Company Act (15 U.S.C. 79l(h)), the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 301 (2 U.S.C. § 431), and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its mem-

bers and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

BCRA § 403(a), 116 Stat. at 113-14

Sec. 403. Judicial Review

(a) Special Rules for Actions Brought on Constitutional Grounds. – If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and to the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by filing a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

11 C.F.R. § 100.29

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

(a) *Electioneering communication* means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section –

(1) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) Refers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

(3)(i) *Publicly distributed* means aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President

or Vice President, publicly distributed means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) A special election or a runoff election is a primary election if held to nominate a candidate. A special election or a runoff election is a general election if held to elect a candidate.

(5) Targeted to the relevant electorate means the communication can be received by 50,000 or more persons –

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal Communications Commission's Web site, http://www.fcc.gov. A link to that site is available on the Federal Election Commission's Web site, http://www.fec.gov. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before

the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7)(i) Can be received by 50,000 or more persons means –

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the

Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the station's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour –

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively

on a cable or satellite television system, but not on a broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that –

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) Electioneering communication does not include any communication that:

(1) Is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including

electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum;

(5) Is not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by a candidate for State or local office in connection with an election to State or local office; or

(6) Is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986. Nothing in this section shall be deemed to supersede the requirements of the Internal Revenue Code for securing or maintaining 501(c)(3) status.

11 C.F.R. § 114.2(a)-(b)

§ 114.2 Prohibitions on contributions and expenditures.

(a) National banks and corporations organized by authority of any law of Congress are prohibited from making a contribution, as defined in 11 CFR 114.1(a), in connection with any election to any political office, including local, State and Federal offices, or in connection with any primary election or

political convention or caucus held to select candidates for any political office, including any local, State or Federal office. National banks and corporations organized by authority of any law of Congress are prohibited form making expenditures as defined in 11 FR 114.1(a) for communications to those outside the restricted class expressly advocating the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party, with respect to an election to any political office, including any local, State or Federal office.

(1) Such national banks and corporations may engage in the activities permitted by 11 CFR part 114, except to the extent that such activity is foreclosed by provisions of law other than the Act.

(2) The provisions of 11 CFR part 114 apply to the activities of a national bank, or a corporation organized by any law of Congress, in connection with local, State and Federal elections.

(b)(1) Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR part 100, subpart B. Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR 114.1(a) in connection with any Federal election.

(2) Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from:

(i) Making expenditures as defined in 11 CFR part 100, subpart D;

(ii) Making expenditures with respect to a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party; or

(iii) Making payments for an electioneering communication to those outside the restricted class. However, this paragraph

(b)(2)(iii) shall not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that:

(A) The committee is not a political committee as defined in 11 CFR 100.5;

(B) The committee incorporated for liability purposes only;

(C) The committee does not use any funds donated by corporations or labor organizations to make electioneering communications; and

(D) The committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.

11 C.F.R. § 114.14

§ 114.14 Further restrictions on the use of corporate and labor organization funds for electioneering communications.

(a)(1) Corporations and labor organizations shall not give, disburse, donate or otherwise provide funds, the purpose of which is to pay for an electioneering communication, to any other person.

(2) A corporation or labor organization shall be deemed to have given, disbursed, donated, or otherwise provided funds under paragraph (a)(1) of this section if the corporation or labor organization knows, has reason to know, or willfully blinds itself to the fact, that the person to whom the funds are given, disbursed, donated, or otherwise provided, intended to use them to pay for an electioneering communication.

(b) Persons who accept funds given, disbursed, donated or otherwise provided by a corporation or labor organization shall not:

(1) Use those funds to pay for any electioneering communication; or

(2) Provide any portion of those funds to any person, for the purpose of defraying any of the costs of an electioneering

communication.

(c) The prohibitions at paragraphs (a) and (b) of this section shall not apply to funds disbursed by a corporation or labor organization, or received by a person, that constitute --

(1) Salary, royalties, or other income earned from bona fide employment or other contractual arrangements, including pension or other retirement income;

(2) Interest earnings, stock or other dividends, or proceeds from the sale of the person's stocks or other investments; or

(3) Receipt of payments representing fair market value for goods provided or services rendered to a corporation or labor organization.

(d)(1) Persons who receive funds from a corporation or a labor organization that do not meet the exceptions of paragraph (c) of this section must be able to demonstrate through a reasonable accounting method that no such funds were used to pay any portion of an electioneering communication.

(2) Any person who wishes to pay for electioneering communications may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104. Use of funds exclusively from such an account to pay for an electioneering communications shall satisfy paragraph (d)(1) of this section. Persons who use funds exclusively from such a segregated bank account to pay for an electioneering communication shall be required to only report the names and addresses of those individuals who donated or otherwise provided an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

[Headers omitted: state "Document 53 Filed 10/06/2006"]

United States District Court
District of Columbia

The Christian Civic League of Maine, Inc., ***Plaintiff,*** *v.* **Federal Election Commission,** ***Defendant,*** *and* **John McCain et al.,** ***Intervenor-Defendants.***	Cause No. **1:06CV00614** (JWR, LFO, CKK) THREE-JUDGE COURT

Notice of Appeal of Dismissal to U.S. Supreme Court

Plaintiff the Christian Civic League of Maine, Inc. ("the League") hereby gives notice that it appeals to the United States Supreme Court from this Court's Order (Docket #51, dated and filed September 27, 2006) granting Intervenor-Defendants' motion for partial judgment on the pleadings and Defendant's motion to dismiss in part and dismissing the League's remaining claims as moot.

Appeal is taken pursuant to 28 U.S.C. § 1253 (providing for direct appeal to the Supreme Court from decisions of three-judge courts denying a permanent injunction) and Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 114 (Public Law 107-155) (providing for direct appeal to the Supreme Court of the "final decision" of this District Court). [*2]

Respectfully submitted,

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MOTION

No. 06-589

IN THE

Supreme Court of the United States

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC.,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee,

and

JOHN MCCAIN, RUSSELL FEINGOLD, CHRISTOPHER SHAYS, MARTIN MEEHAN, AND TOM ALLEN,
Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM OF INTERVENOR-APPELLEES SENATOR JOHN MCCAIN, SENATOR RUSSELL FEINGOLD, REPRESENTATIVE CHRISTOPHER SHAYS, REPRESENTATIVE MARTIN MEEHAN, AND REPRESENTATIVE TOM ALLEN

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QUESTIONS PRESENTED

1. Whether the three-judge district court correctly concluded that plaintiff's claim that Title II of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, is moot and not "capable of repetition, yet evading review" in the particular circumstances present here.

2. Whether the three-judge district court correctly concluded that plaintiff's unspecified claim that Title II of BCRA is unconstitutional as applied to advertisements that it might someday decide to run is not ripe.

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INTRODUCTION

In this appeal, plaintiff Christian Civic League of Maine, Inc. (CCL) challenges the unanimous decision of a three-judge district court dismissing its complaint for declaratory and injunctive relief for lack of a justiciable case or controversy within the meaning of Article III of the Constitution.

CCL brought an as-applied constitutional challenge to the electioneering communications provisions of the Federal Election Campaign Act (FECA or Act), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA). It alleged that the Act unconstitutionally prohibited CCL from using its general treasury funds to broadcast, within 30 days of Maine's June 13, 2006 Republican primary election, a radio advertisement that referred to a clearly identified candidate in that election and criticized her position on a controversial issue (the "Crossroads" advertisement). CCL further alleged that the Act unconstitutionally restricted its ability to run, at some unspecified time in the future, unspecified "grassroots lobbying" ads that are "materially similar" to the "Crossroads" advertisement and relate potentially to a "range of issues."

CCL initially sought a preliminary injunction permitting it to finance broadcasts of the "Crossroads" advertisement with unrestricted funds from May 14, 2006, when the ad became an "electioncering communication" under FECA, until June 5, 2006, the scheduled date of a Senate vote on the federal Marriage Protection Amendment, which CCL's advertisement discussed. The three-judge district court declined to grant the preliminary injunction, and this Court, on May 15, 2006, denied CCL's request to expedite its appeal of that order. On June 7, 2006, the Senate considered and defeated the Marriage Protection Amendment. CCL never ran the proposed advertisement, and it has expressly disavowed any concrete plan to do so in the future. Nonetheless, it sought immediate review in this Court, which dismissed CCL's initial appeal as moot on October 2, 2006.

Meanwhile, CCL continued to seek declaratory and permanent injunctive relief before the three-judge district

court. After briefing and argument, the three-judge court concluded that CCL's claims with respect to the "Crossroads" advertisement were moot, and that they were not saved by the "capable of repetition, yet evading review" exception. As to CCL's claim relating to hypothetical non-"Crossroads" advertisements that CCL might seek to run at some unspecified date in the future, the three-judge court concluded that CCL's claim was not ripe.

These conclusions were correct. The purported injury that CCL sought to avoid—losing the opportunity to broadcast its "Crossroads" advertisement using the corporation's general treasury funds prior to the Senate vote—has passed. This Court cannot turn back the clock, nor can it somehow undo the alleged "irreparable injury" that CCL sought to avoid through emergency relief. Because "[n]o order of this Court could affect the parties' rights with respect to the injunction [it is] called upon to review," *Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (per curiam), there is no justiciable case or controversy under Article III. Nor is there any basis for applying the "capable of repetition, yet evading review" exception to CCL's request. CCL has failed to establish that the same controversy involving the same parties is likely to recur in the foreseeable future.

To the extent CCL seeks relief to run yet-to-be-defined "non-Crossroads" ads at some unspecified date in the future, that claim is too speculative and hypothetical to satisfy the ripeness requirement. CCL has admitted that it has no concrete plans to run any future ads, and CCL's allegation that it might run ads "materially similar" to the "Crossroads" advertisement does not make CCL's claim sufficiently concrete. As the district court recognized, CCL's claim as to future ads is so broad and amorphous that it amounts to nothing more than a facial challenge to BCRA—a challenge that this Court rejected in *McConnell* v. *FEC*, 540 U.S. 93 (2003).

Because plenary review of the three-judge court's dismissal would not resolve any substantial federal question, this Court should summarily affirm the decision below. CCL

identifies no basis for this Court to revisit the well-settled mootness and ripeness rules that the three-judge district court applied in this case. The three-judge court correctly applied those rules in concluding that CCL's claim relating to the "Crossroads" advertisement was moot and not "capable of repetition," and that its claim relating to future advertisements was not ripe for adjudication.

Finally, even were this Court to conclude that some portion of CCL's claims were justiciable, it should resist CCL's invitation to reach the merits of those claims in the absence of a developed factual record, lower court briefing of the issue, or a lower court opinion addressing the merits of CCL's claims. CCL's request that this Court reach the merits of its as-applied challenge—notwithstanding the absence of lower court consideration—is particularly unnecessary given that a different three-judge district court recently addressed the merits of a similar challenge. *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260, 2006 WL 3746669 (D.D.C. Dec. 21, 2006). As a result, this Court will likely have the opportunity to entertain plenary review of an as-applied challenge to Title II of BCRA and to do so in a case with a factual record and lower court consideration of the merits of the dispute. This Court should summarily affirm the lower court's decision.

STATEMENT

1. The "electioneering communication" provisions contained in FECA prohibit corporations and labor unions from using their general treasury funds to pay for any "broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and that is broadcast within either 30 days of a federal primary election or 60 days of a general election in the jurisdiction in which the named candidate is running. 2 U.S.C. §§ 441b(2), 434(f)(3); *see also* 11 C.F.R. § 100.29 (defining "electioneering communication"). This Court upheld the constitutionality of those provisions against a facial challenge in *McConnell* v. *FEC*, 540 U.S. 93 (2003). Noting its longstanding "respect for the legislative judgment that the special characteristics of the cor-

porate structure require particularly careful regulation," the Court "easily" concluded that compelling governmental interests support the prohibition on electioneering communications financed with general corporate funds. *Id.* at 205 (internal quotation marks omitted).

In *Wisconsin Right to Life, Inc.* v. *FEC*, 126 S. Ct. 1016 (2006) (per curiam), this Court clarified that its decision in *McConnell* upholding the electioneering communications provisions against facial attack "did not purport to resolve future as-applied challenges." *Id.* at 1018. The Court therefore left open the possibility that constitutional issues might arise from application of those provisions to "particular communications." *Id.* at 1017.

2. a. CCL commenced this action on April 3, 2006. According to the complaint, CCL intended to broadcast in early June 2006 a radio advertisement that referred to Senator Olympia Snowe, a candidate in Maine's June 13, 2006 Republican primary. The advertisement, entitled "Crossroads," began by warning listeners that "[m]arriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges." J.S. 1 n.1 (quoting Compl. Ex. A). The advertisement then condemned Senator Snowe's position on that issue by stating that she "[u]nfortunately" "voted against the Marriage Protection Amendment two years ago." *Id.* The advertisement continued by urging listeners to "call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June." *Id.*

The complaint conceded that this advertisement constituted an "electioneering communication" within the meaning of FECA, and therefore that the law prohibited CCL from using general treasury funds to finance the advertisement's broadcast within 30 days of the primary election. Compl. ¶ 14. CCL, however, sought a judgment declaring those provisions unconstitutional as applied to the advertisement. CCL also sought preliminary and permanent injunctive relief permitting it to broadcast the "Crossroads" ad to Maine

voters until the Senate's June 2006 vote on the Marriage Protection Amendment. *Id.* at 13.

The complaint also alleged that CCL intends to run advertisements "materially similar" to the "Crossroads" advertisement "before future primary and general elections in Maine" (Compl. ¶ 16) and sought declaratory and injunctive relief with respect to such hypothetical "electioneering communications by CCL that constitute grass-roots lobbying" (*id.* at 13). Neither the complaint nor the record contains any indication of the content of any such future ads or the circumstances in which CCL might wish to broadcast them.

b. With respect to the request for preliminary relief, the three-judge court permitted abbreviated discovery, lasting approximately one week and including one deposition. The few facts that emerged in that period revealed that CCL's interest in sponsoring the "Crossroads" ad arose only after it was contacted by another group, Focus on the Family. On March 24, 2006, that organization sent to a broad list of groups nationwide an email solicitation entitled "Possible legal action needed." FEC Opp. to Mot. for Prelim. Inj. Ex. B. The email stated that it was sent to certain groups "because [they were] in [states] that could be affected by the McCain-Feingold restrictions on Marriage Amendment lobbying ads that target U.S. senators who are on the ballot." *Id.* Attached to the email was a message from counsel, who offered to seek a federal court injunction at no charge on behalf of "any group" that would "step up" by running a "grass roots lobbying" ad during the electioneering communications period. *Id.* Counsel further noted that "[t]his may even involve an appeal to the U.S. Supreme Court (which would result in a landmark ruling.)" *Id.* The email directed any recipient "willing to assist in this matter" to contact counsel directly. *Id.*

Within an hour of receiving that email, CCL's executive director responded to counsel, stating, "I will run an ad in that period of time mentioning Olympia Snowe." FEC Opp. to Mot. for Prelim. Inj. Ex. C. Focus on the Family then

sent CCL "hypothetical" information on advertising rates in Maine radio markets and also supplied CCL with the text of the "Crossroads" ad that was attached to the complaint CCL filed several days later in the court below. Heath Dep., FEC Opp. to Mot. for Prelim. Inj. Ex. A 46, 51, 59; Ex. D ("Heath Dep.").

On April 13, 2006—ten days after this suit commenced—Mr. Heath testified that CCL lacked the approximately $4,000 it estimated would be required to broadcast the "Crossroads" advertisement, had done nothing to record or produce it, had not contacted a single radio station about buying time to broadcast the ad, and did not know where or how often the ad would run. Heath Dep. 50-52, 54, 65-68, 70. Eight days later, CCL filed a supplemental declaration of Mr. Heath stating that CCL had located a single donor willing to contribute approximately $3,900 to finance the ad's broadcast. Heath Decl., Attachment to Pl.'s Reply in Supp. of Mot. for Prelim. Inj. 5. Federal law permits a separate segregated fund to accept contributions of up to $5,000 from a single member, and CCL identified no law that would have precluded it from establishing a separate segregated fund to accept the $3,900 contribution.[1] Had it done so, that affiliated entity could have paid for the advertisements at issue.

3. On May 9, 2006, following expedited briefing, the three-judge district court unanimously denied CCL's motion for a preliminary injunction. The court concluded, as to the "Crossroads" advertisement, that CCL had not demonstrated a likelihood of success on the merits because, "[p]articularly after *McConnell*, there can be no question that the governmental interest in maintaining the integrity of the electoral process is compelling" and FECA is "narrowly tailored" to serve that interest "with respect to [CCL's] proposal to pay for the broadcast of its advertisement from its corporate funds." *Christian Civic League of Me., Inc.* v. *FEC*, 433 F. Supp. 2d 81, 88 (D.D.C. 2006). The

[1] *See* 2 U.S.C. § 441a(a)(1)(C); 11 C.F.R. § 110.1(b).

court further found that CCL failed to establish irreparable injury because CCL could easily comply with FECA (by, among other things, directing the single donation for the "Crossroads" advertisement through a separate segregated fund or choosing a different medium for its advertisement) and granting preliminary relief would disserve the public interest by injuring the Commission in its efforts to enforce federal law. *Id.* at 89. As to future non-"Crossroads" advertisements to be run at some unspecified time in the future, the court found an injunction unwarranted because CCL had failed to identify the content of such future communications or to establish any necessity for preliminary relief. *Id.* at 84 n.1.

4. a. CCL noticed an interlocutory appeal on May 11, 2006, and the following day filed both a jurisdictional statement and a request that this Court review the decision below on a highly expedited schedule. Such expedition was necessary, CCL argued, because if the appeal were heard in the usual course, "the League will lose its opportunity to speak before the anticipated June 5 Senate vote [on the Federal Marriage Protection Amendment] forever." 05-1447 J.S. 12. Asserting that it hoped to run the advertisement prior to the vote, CCL contended that it would be irreparably injured if it could not obtain a final decision before that date. *Id.* at 28. This Court denied the motion to expedite on May 15, 2006.

b. On May 22, 2006, pursuant to an order issued in conjunction with the denial of preliminary injunctive relief, the parties jointly submitted a statement containing their respective positions on further administration of the case. Both the FEC and Intervenor-Defendants urged the court to "use the time now available to build a [full factual] record so that this case is ready for a final decision at the earliest feasible time." Joint Report Pursuant to May 9, 2006 Order 5. CCL sought a stay of the three-judge court proceedings, asserting that because "CCL presently has no concrete plans to run ads" in the future, "there is no longer any pressing need" for "resolution by this Court of the questions pre-

sented." *Id.* at 8. The three-judge district court denied CCL's request for a stay and, following a status conference on June 5, 2006, ordered the parties to file discovery plans.

c. Before the court acted on the resulting proposals,[2] it *sua sponte* issued an order expressing its view that "the 'Crossroads' portion of the case . . . appears moot unless the 'capable of repetition[,] yet evading review' exception applies." June 23, 2006 Order 1. "That exception may not apply," the court further suggested, "because the 'Crossroads' advertisement portion of the case—particularly in this fact-centered, as-applied challenge—may not be 'capable of repetition.'" *Id.* The court therefore ordered CCL to "show cause . . . why the 'Crossroads' portion of the case should not be dismissed as moot" and directed the FEC and Intervenor-Defendants to file papers addressing the same issue. *Id.* at 2.

CCL argued in response that the "Crossroads" claim was not moot because it fell within the "capable of repetition, yet evading review" exception, contending that it intended in the future to run what it called "materially similar" ads. Pl.'s Resp. to June 23, 2006 Order 1. CCL could specify nothing about those hypothetical advertisements, however, and acknowledged that it had no concrete plans to develop or broadcast them. Instead, CCL stated that by "materially similar" ads, it "means that the ads' text, placement and timing would put them in contravention of the electioneering communication prohibition, just as the text, placement, and timing of the Crossroads ad put it in contravention of the electioneering communication prohibition." Pl.'s Opp. to FEC Mot. to Dismiss 6-7.

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[2] The FEC and Intervenor-Defendants proposed two alternative schedules: either six or nine weeks of discovery commencing on June 26, 2006, followed by summary judgment briefing on an expedited basis. Joint Report Pursuant to June 5, 2006 Order 3-5. CCL reiterated that because it "currently has no specific plans to run [any 'grassroots lobbying'] ads between now and election day" (*id.* at 2), "radical expedition is no longer warranted in this case" (*id.* at 7).

In their response to the district court's directive to address the mootness issue, Intervenor-Defendants observed that CCL had not made a sufficient showing that the controversy was "capable of repetition."[3] As a threshold matter, CCL had conceded on more than one occasion that it had no concrete plans to run *any* advertisements beyond the "Crossroads" advertisement about *any* policy issue. Intervenor-Defs.' Resp. to June 23, 2006 Order 4-5. Intervenor-Defendants did not rule out the possibility that the present controversy would be capable of repetition if CCL demonstrated the existence of a real prospect that it would run the "Crossroads" advertisement or a sufficiently similar advertisement in "materially similar circumstances" sometime in the foreseeable future. *Id.* at 6. What plainly did not suffice, however, was CCL's general allegation of an intent to run advertisements that are "materially similar" to the "Crossroads" advertisement only in the sense that they meet FECA's definition of an "electioneering communication": such allegations would support only the *facial* challenge that this Court already resolved in *McConnell* and therefore could not establish that the *as-applied* challenge presented by the "Crossroads" claim was "capable of repetition." *Id.* at 6-7 & n.1; Aug. 8, 2006 Tr. 18-20. And, where CCL only sought to run its advertisement after receiving a solicitation from a third party, and where it conceded that it had no concrete plans for the future, CCL could not show that the present dispute would recur. Intervenor-Defs.' Resp. to June 23, 2006 Order 7-8.

On September 27, 2006, the three-judge court granted the Partial Motion to Dismiss of Defendants and the Partial Motion for Judgment on the Pleadings of Intervenor-Defendants. The court concluded that with respect to the non-"Crossroads" advertisement, CCL's claims were "not ripe and/or too speculative and hypothetical to be justicia-

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[3] The FEC likewise indicated in its submission that, although it was a difficult and "close question" whether the "capable of repetition, yet evading review" exception applied to the "Crossroads" claims (FEC Resp. to June 23, 2006 Order 3; Aug. 8, 2006 Tr. 11), the exception did not apply.

ble." J.S. App. 2a. And, as to the "Crossroads" advertisement, the court explained that that claim was "moot and not saved by the 'capable of repetition, yet evading review' exception to that doctrine." *Id.* Applying established Supreme Court precedent, the three-judge court found that CCL had not established a "reasonable expectation or a demonstrated probability that the *same* controversy will recur involving the same complaining party." *Id.* at 11a (quoting *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (internal quotation marks omitted)). The three-judge court further explained that even if CCL had satisfied the "same controversy" prong of the analysis, it had not demonstrated that the type of controversy would evade review. Accordingly, it concluded that CCL's claims with respect to the "Crossroads" advertisement were moot. *Id.* at 13a.

ARGUMENT

I. PLENARY REVIEW IS UNWARRANTED AND THE UNANIMOUS DECISION OF THE THREE-JUDGE COURT SHOULD BE SUMMARILY AFFIRMED

Plenary review of the three-judge court's dismissal would not resolve any substantial question as to the constitutionality of Title II of BCRA, but instead would turn on settled principles under the ripeness and mootness doctrines. Indeed, the decision below was based solely on the ground that the case is not justiciable, and the three-judge district court reached each of its conclusions by properly applying firmly established Supreme Court precedent to the unique facts of this case. This Court should not revisit these settled doctrines but instead should summarily affirm the three-judge district court's dismissal of both CCL's claim regarding hypothetical future advertisements and CCL's claim regarding the advertisement it sought to run in the Spring of 2006.[4]

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[4] CCL's right to appeal to this Court does not immunize it from the requirement of demonstrating a substantial constitutional question worthy of this Court's plenary review. *See* Stern & Gressman, *Supreme*

A. As to its conclusion that CCL's claims concerning hypothetical future advertisements were not ripe, the three-judge district court pointed to this Court's admonition that "Article III . . . confines . . . [the courts] to resolving real and substantive controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." J.S. App. 6a (alterations in original) (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (internal quotation marks omitted)); *see also Renne* v. *Geary*, 501 U.S. 312 (1991) (holding non-justiciable a First Amendment challenge to a California election law provision on the basis of plaintiffs' failure to allege a present intention to endorse a particular candidate).

The three-judge court was correct in concluding that CCL was unable to identify any concrete controversy requiring judicial intervention. Indeed, in the face of the allegation in CCL's complaint that it intended to run "materially similar grass-roots lobbying ads . . . on a range of issues in addition to laws protecting traditional marriage," CCL's own executive director testified that CCL had no specific plans to run any such broadcast advertisements. *See* Heath Dep. 74-75, 82-83. Even CCL's counsel "forthrightly confirmed this lack of plans in a May 22, 2006 report to the court and at a June 5, 2006 status conference." J.S. App. 6a, (citing Joint Report pursuant to May 9, 2006 Order 8 ("no concrete plans to run ads") and June 5, 2006 Status Conference Tr. 14 ("We have no current plan to do an ad . . . .")).

This complete absence of concrete plans to run any future advertisements is unsurprising: prior to this lawsuit, CCL had apparently run only one broadcast advertisement about the federal marriage amendment or any other policy

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Court Practice 473, 483 (8th ed. 2002) (observing that, aside from the notice of appeal, "the procedure in appeals and certiorari cases is virtually identical" and the appellant should demonstrate a question "'so substantial as to require plenary consideration, with briefs on the merits and oral argument'" (quoting former S. Ct. R. 15.1(h))).

issue in its 110-year history. Yet, despite this history and the admissions of its Executive Director and counsel, CCL continued to argue that it intended to run "materially similar" advertisements in the future. By "materially similar," however, CCL made clear that it simply meant that "the ads' text, placement and timing would put them in contravention of the electioneering communication prohibition, just as the text, placement, and timing of the Crossroads advertisement put it in contravention of the electioneering communication prohibition." Pl.'s Opp. to FEC Mot. to Dismiss 6-7. Finding that CCL's hypothetical advertisements were not ripe for review, the three-judge court correctly recognized that CCL's attempt to define "material similarity" so broadly "would simply devolve into a facial challenge to the relevant statutory provision—a challenge that the Supreme Court has already rejected." J.S. App. 8a, (citing *McConnell* v. *FEC*, 540 U.S. 93, 189-194, 203-211 (2003)). Given the opportunity to identify any more specific "similarity" between the "Crossroads" advertisements and some advertisement that it might decide to run at some future date, CCL repeatedly declined to do so.

Taking those facts into account, the three-judge district court looked to this Court's decision in *Renne*, 501 U.S. at 321-322 (concluding that plaintiffs' First Amendment challenge was not ripe given plaintiffs' failure to assert a present intention to endorse a candidate), and found that CCL similarly lacked any sufficiently imminent or concrete injury to invoke Article III jurisdiction.[5] The lower court's conclusion that the claim concerning the hypothetical future advertise-

[5] Instructively, in a recent decision by a separate three-judge court, Wisconsin Right to Life brought an as-applied challenge not only with respect to specific advertisements run prior to the 2004 elections, but also with respect to future hypothetical "grassroots lobbying" advertisements. *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260, 2006 WL 3746669 (D.D.C. Dec. 21, 2006) (*WRTL*). The court, citing the decision by the three-judge court in this case, found WRTL's intent to run such advertisements "too speculative and thus not sufficiently concrete to state a cognizable claim." *Id.* at *5.

ments was not ripe is correct and should be affirmed by this Court.

B. As to the "Crossroads" advertisement, CCL's request for injunctive and declaratory relief no longer presents a live controversy. The proposed injunction and request for declaratory relief concerned a specific communication and a specific time period: CCL sought an order permitting it to broadcast the "Crossroads" advertisement from May 14, 2006, when that advertisement became an "electioneering communication" under Title II of BCRA, until June 5, 2006, when the Senate had scheduled a vote on the federal Marriage Protection Amendment. That time period expired, and CCL explicitly disavowed any plans to broadcast the "Crossroads" advertisement in the future. The Senate defeated the Marriage Protection Amendment on June 7, 2006, and no additional vote on that legislation is currently contemplated. Following that vote, CCL informed the three-judge court that it "presently has no concrete plans to run ads beyond what it began on May 10." Joint Report Pursuant to May 9, 2006 Order 8; Joint Report Pursuant to June 5, 2006 Order 2 (stating that CCL "currently has no specific plans to run [any 'grass-roots lobbying'] advertisements between now and election day (November 7)" that would be considered electioneering communications under the Federal Election Campaign Act).

The alleged "harm" that CCL sought to avoid through injunctive relief—losing the opportunity to broadcast its "Crossroads" advertisement prior to the Senate vote—has thus occurred and is irrevocable. *See* Joint Report Pursuant to June 5, 2006 Order 7 (noting that "[b]ecause the FEC was not enjoined from enforcing the electioneering communication prohibition against the broadcast of [Crossroads], the opportunity for the exercise of the commensurate First Amendment rights of speech and petition were irreparably lost"). A forward-looking injunction cannot address historical events; accordingly, "[n]o order of this Court could affect the parties' rights with respect to the injunction [it is] called upon to review." *Honig* v. *Students of Cal. Sch. for the*

Blind, 471 U.S. 148, 149 (1985) (per curiam); *see also DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). Similarly, declaratory relief regarding the "Crossroads" advertisement would not redress CCL's asserted injury, and the request for it cannot revive an otherwise moot claim. Thus, the three-judge district court correctly relied upon this Court's admonition that a claim is moot when the court "cannot grant any effectual relief whatever." J.S. App. 10a (quoting *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (per curiam)) (internal quotation marks omitted).

The lower court was also correct in concluding that, on the record below, the exception to the mootness doctrine for disputes that are "capable of repetition, yet evading review" does not apply. J.S. App. 11a-13a. As this Court recently explained, "[t]he capable-of-repetition doctrine applies only in exceptional situations, where the following two circumstances are simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the *same* action again." *Spencer* v. *Kemna*, 523 U.S. 1, 17-18 (1998) (emphasis added; internal citation and quotation marks omitted); *see also Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). Thus, CCL had the burden, at a minimum, of demonstrating a "reasonable expectation" that it would seek to run an advertisement materially similar to the "Crossroads" advertisement, under materially similar circumstances, in the foreseeable future. Given the opportunity to assert such an intention, however, CCL admitted during discovery that it "presently has no concrete plans to run ads beyond what it began on May 10." Joint Report Pursuant to May 9, 2006 Order 8. This failure is especially significant given CCL's extremely limited history of prior activity resembling the kind of advertisement that it sought to run here and the unique circumstances under which it proposed to run even this advertisement.

Attempting to place itself within the exception despite this void, CCL argues that it need only assert that it might run future advertisements that fall within the general scope of BCRA's prohibition on the use of general treasury funds to finance "electioneering communications." But that is not what the doctrine requires. *See Lewis*, 494 U.S. at 481 (dispute is capable of repetition only if there is "a reasonable expectation that the same complaining party would be subjected to *the same action* again" (emphasis added) (quoting *Murphy*, 455 U.S. at 482)).

CCL's jurisdictional statement contends that the three-judge court took an overly restrictive view of the "capable of repetition" exception (J.S. 9) but the lower court did no more than apply the doctrine as defined by this Court. *See id.* at 11a (quoting *Murphy*, 455 U.S. at 482, for the proposition that CCL must establish a "reasonable expectation or a demonstrated probability that the *same* controversy will recur involving the same complaining party" (internal quotation marks omitted)). Indeed, the doctrine's requirement of similarity is particularly applicable here, for the merits of the action are highly dependent on circumstances that CCL has not alleged will recur. Specifically, the content of the "Crossroads" advertisement as well as the context surrounding its creation—including the ready availability of other means of conveying CCL's desired message and the circumstances of the campaign—are important to the ultimate resolution of the case. *See Public Utils. Comm'n of Cal.* v. *FERC*, 100 F.3d 1451, 1460 (9th Cir. 1996) ("When resolution of a controversy depends on facts that are unique or unlikely to be repeated, the action is not capable of repetition and hence is moot.").

Nor does the recent holding of a separate three-judge court in *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260, 2006 WL 3746669 (D.D.C. Dec. 21, 2006), support CCL's contention that the present controversy meets the "capable of repetition, yet evading review" exception to the mootness doctrine. In that case, on remand from this Court to consider the merits of a separate as-applied challenge to the ap-

plication of the "electioneering communications" rules to three specific 2004 advertisements that WRTL sought to run in the Wisconsin mid-term elections, the court found that WRTL's intention to run future advertisements covered by BCRA—while too speculative to render justiciable WRTL's claim as to any future, hypothetical "grassroots lobbying" advertisements—was nonetheless sufficient to render WRTL's challenge as to the 2004 ads "capable of repetition, yet evading review." *Id.* at *4 (internal quotation marks omitted).

That decision, involving a completely different context, cannot help CCL satisfy the "capable of repetition" exception here. WRTL, after running the 2004 advertisements, attempted to run a different broadcast advertisement during the "electioneering communications" period in 2006. That fact was critical in convincing the three-judge district court that there was a "reasonable expectation" that WRTL's 2004 ads would be "subject to the same action again." 2006 WL 3746669, at *4 & n.15 (internal quotation marks omitted). CCL, in marked contrast, admitted in statements postdating its application for preliminary relief that it had "no current plans to broadcast any advertisements about any issue" other than the "Crossroads" advertisement. J.S. App. 5a. CCL confirmed this fact in a May 22, 2006 report to the three-judge court and at a June 5, 2006 status conference. *Id.* at 6a. CCL had neither intent nor funds to run even the "Crossroads" advertisement until it was approached by another organization with a message from counsel, who sought to build a test case around the advertisement. Whatever the ultimate merits of the *WRTL* decision (which is likely to be subject to review by this Court), CCL has done nothing to demonstrate that there exists a "reasonable expectation" that its claim will recur. *Spencer*, 523 U.S. at 17-18 (internal quotation marks omitted).

II. IF THIS COURT FINDS THE CLAIMS TO BE JUSTICIABLE, IT SHOULD REMAND TO THE THREE-JUDGE COURT IN THE FIRST INSTANCE FOR A DECISION ON THE MERITS

Even if this Court were to find that CCL's as-applied claims are justiciable, the merits of those claims should be considered by the three-judge district court in the first instance, after the development of a proper record.

Reaching the merits of CCL's claims prematurely would violate the "fundamental principle" of "exercising [the Court's] powers of judicial review only as a matter of necessity." *Sanks* v. *Georgia*, 401 U.S. 144, 151 (1971). Such restraint is particularly justified in the "obvious cases in which lower court rulings have forestalled development of a trial record." 17 Wright & Miller, *Federal Practice and Procedure* § 4036, at 38-39 (2d ed. 1988); *see also National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ([W]e do not decide in the first instance issues not decided below. (citing *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-254 (1999); *United States* v. *Bestfoods*, 524 U.S. 51, 72-73 (1998))).

The three-judge district court has not had occasion to address the merits of CCL's fact-intensive, as-applied claims and has not provided the parties with the opportunity to develop the record necessary to do so. Shortly after the June 2006 Senate vote referenced in CCL's "Crossroads" advertisement had come and gone, the lower court, recognizing that CCL's claims may not be justiciable, ordered the parties to brief the issue of mootness and directed CCL to "show cause . . . why the 'Crossroads' portion of this case should not be dismissed as moot." June 23, 2006 Order 2. The court stayed all merits discovery pending briefing. *Id.* Thus, no fact-development has taken place beyond the very limited one week of discovery in connection with CCL's preliminary injunction motion. Under these circumstances, this Court should not consider the merits of this case in the first instance.

This Court should instead take the same course it took earlier this year in *WRTL*, 126 S. Ct. 1016 (2006). That case, discussed above, involved another fact-intensive, as-applied

challenge to BCRA's "electioneering communications" provisions. After holding that the district court incorrectly construed a footnote in *McConnell* as foreclosing any "as-applied" challenge, the Court remanded the case for the three-judge district court to consider the merits in the first instance. *Id.* at 1018.[6]

CCL requests in its jurisdictional statement that this Court consider this case together with *WRTL*. That request, made prior to the recent decision on the merits in *WRTL*, fails to address the jurisdictional and procedural deficiencies discussed above. Indeed, if anything, the fact that it is likely that *WRTL* will be appealed to this Court counsels in favor of affirming the present case. *WRTL* will present the Court with the opportunity, if it deems it appropriate, to consider the merits of an as-applied challenge to Title II of BCRA. It will do so, moreover, in the context of a case with a factual record and in which the lower court addressed the merits of the dispute after briefing by the parties.[7] As a

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[6] CCL, in arguing that so-called "grassroots lobbying" ads can somehow be distinguished from electioneering, mischaracterizes this Court's holding in *WRTL*. The Court did not "approve[]" the bringing of a "grassroots lobbying" challenge; nor did it "highlight[]" the FEC's authority to provide by rule a grassroots lobbying exception." J.S. 12, 20, 24. This Court held only that *McConnell* "did not purport to resolve future as-applied challenges" to BCRA's electioneering communications provision. *WRTL*, 126 S. Ct. at 1018 (citing 540 U.S. at 190 n.73). Moreover, although CCL purports to find support for a "grassroots lobbying" exception in comments that the principle sponsors of BCRA submitted to the FEC in the rulemaking implementing Title II of BCRA (J.S. 24) CCL fails to note that the FEC rejected the proposal (and other proposals) because it found that they would have exempted communications that "could well be understood to promote, support, attack, or oppose a Federal candidate," 67 Fed. Reg. 65,190, 65,201 (Oct. 23, 2002). Nor does CCL explain how a proposed (and rejected) regulatory standard could possibly mandate a constitutional standard.

[7] The *WRTL* three-judge court did not conduct a trial, and the dissenting judge concluded that the case was not properly resolved on summary judgment. 2006 WL 3746669, at *11, 17 (Roberts, J., dissenting). Nonetheless, the parties developed a substantial factual record on sum-

result, *WRTL* merely serves to highlight why this Court should not grant plenary review to CCL's claims in the first instance. At most, if the three-judge decision in *WRTL* is appealed to this Court, the Court should hold CCL's jurisdictional statement pending its review of the *WRTL* appeal.

CONCLUSION

For the above reasons, this Court should summarily affirm the decision of the three-judge district court dismissing CCL's complaint for lack of a justiciable case or controversy.

Respectfully submitted,

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mary judgment, which would aid this Court in its review of the lower court's decision.

(3)

No. 06-589

In the Supreme Court of the United States

CHRISTIAN CIVIC LEAGUE OF MAINE, INC.,
APPELLANT

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM FOR THE FEDERAL ELECTION COMMISSION

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QUESTION PRESENTED

Whether the three-judge district court correctly held that appellant's as-applied constitutional challenge to the federal statutory prohibition on the use of corporate treasury funds to finance "electioneering communications" is not currently justiciable.

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In the Supreme Court of the United States

No. 06-589

CHRISTIAN CIVIC LEAGUE OF MAINE, INC., APPELLANT

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM FOR THE FEDERAL ELECTION COMMISSION

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-14a) is unreported. A prior opinion of the district court is reported at 433 F. Supp. 2d 81.

JURISDICTION

The decision of the three-judge district court was issued on September 27, 2006. A notice of appeal was filed on October 6, 2006, and the jurisdictional statement was filed on October 26, 2006. The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114.

STATEMENT

This case concerns the "electioneering communication" provision contained in Section 203 of the Biparti-

san Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91. The provision prohibits corporations from using their general treasury funds to pay for any "electioneering communication," defined as a communication that refers to a candidate for federal office and is broadcast within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running. BCRA § 203, 116 Stat. 91 (2 U.S.C. 441b(b)(2) (Supp. IV 2004)). This Court has sustained BCRA § 203 against a facial constitutional challenge, see *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003), but has held that the provision is subject to as-applied challenges, see *Wisconsin Right to Life, Inc.* v. *FEC*, 126 S. Ct. 1016, 1018 (2006) (*WRTL I*) (per curiam). Appellant filed suit in federal district court, arguing that BCRA's restrictions on the financing of "electioneering communications" are unconstitutional as applied to appellant's own proposed broadcast advertisements. The three-judge district court ultimately dismissed appellant's claims. J.S. App. 1a-14a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(a)(8) and (d) (Supp. IV 2004); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. a. Federal law has long prohibited both for-profit and nonprofit corporations from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See *FEC* v. *Beaumont*, 539 U.S. 146, 152-154 (2003). The FECA makes it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). However, the FECA permits a corporation to establish a "separate segregated fund," commonly called a political action committee or PAC, to finance those disbursements. 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. IV 2004). The fund "may be completely controlled" by the corporation, and it is "separate" from the corporation "'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982) (quoting *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 414 (1972)). The fund may solicit and accept donations voluntarily made for political purposes by the corporation's stockholders or members and its employees, and the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in a corporation's separate segregated fund can be contributed directly to candidates for federal office, and it may be used to pay for independent expenditures to communicate to the general public the corporation's views on such candidates.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court held that Section 441b's prohibition on the use of corporate treasury funds to finance independent expenditures for campaign-related speech could not constitutionally be applied to a corporation that (1) was "formed for the ex-

press purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *Id.* at 264; see *McConnell*, 540 U.S. at 210; 11 C.F.R. 114.10 (implementing the *MCFL* exception). Corporations possessing the characteristics identified in that case are commonly referred to as "*MCFL* organizations." See, *e.g.*, *McConnell*, 540 U.S. at 210.

The Court in *MCFL* also adopted a narrowing construction of 2 U.S.C. 441b even as applied to corporate entities that do not qualify as *MCFL* organizations. In interpreting Section 441b's prohibition of corporate "expenditure[s]," the Court noted that the FECA definition of "expenditure" encompassed "the provision of anything of value made 'for the purpose of influencing any election for Federal office.'" *MCFL*, 479 U.S. at 245-246 (quoting 2 U.S.C. 431(9)(A)(i)) (emphasis omitted). To avoid problems of vagueness and overbreadth, the Court construed Section 441b's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. *Id.* at 248-249; see 2 U.S.C. 431(17) (pre-BCRA law). The Court had previously introduced the concept of express advocacy in *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976), when it narrowly construed other FECA provisions regulating independent campaign expenditures. *Buckley* provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52.

b. Based on its assessment of evolving federal campaign practices, Congress subsequently determined that, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *McConnell*, 540 U.S. at 126. In the wake of *Buckley*, corporations and labor unions crafted political communications that avoided the so-called magic words of electoral advocacy and financed those communications with "hundreds of millions of dollars" from their general treasuries. *Id.* at 127. Indeed, even the advertisements aired by federal candidates themselves rarely included express exhortations to vote for or against a particular candidate. See *id.* at 127 & n.18, 193 & n.77. "[T]he conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* at 127.

"Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 194. BCRA § 203 amended 2 U.S.C. 441b(b) to bar any corporation or union from paying for an "electioneering communication" with money from its general treasury. 2 U.S.C. 441b(b)(2) (Supp. IV 2004). The term "electioneering communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 88

(2 U.S.C. 434(f)(3)(A)(i) (Supp. IV 2004)).[1] The prohibition on the use of corporate funds for electioneering communications does not apply to "*MCFL* organizations." See *McConnell*, 540 U.S. at 209-211. A corporation or union remains free, moreover, to establish a separate segregated fund and to pay for electioneering communications from that fund. See 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. IV 2004).

3. In *McConnell*, this Court upheld against a facial constitutional challenge BCRA § 203's ban on the use of corporate or union treasury funds for electioneering communications. See 540 U.S. at 203-209. The Court observed that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view * * * [BCRA § 203] as a 'complete ban' on expression rather than a regulation." *Id.* at 204 (quoting *Beaumont*, 539 U.S. at 162; see *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990)). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *McConnell*, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S.

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[1] BCRA excludes from the definition of "electioneering communication" "(i) a communication appearing in a news story, commentary, or editorial distributed through" a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the Federal Election Campaign Act; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a), 116 Stat. 88 (2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. IV 2004)). The definition also does not encompass print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, and it does not cover telephone or Internet communications. See *McConnell*, 540 U.S. at 207.

at 163). The Court also noted that its campaign-finance jurisprudence reflects "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (citations and internal quotation marks omitted).

The Court in *McConnell* further held that the compelling governmental interests that support the requirement that corporations finance express advocacy through a PAC apply equally to corporate financing of electioneering communications. 540 U.S. at 206. Based on its examination of the record before the district court, the Court concluded that the "vast majority" of prior advertisements encompassed by BCRA's definition of the term "electioneering communications" were intended to influence electoral outcomes. *Ibid.* The Court further observed that, "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Ibid.*

4. In *WRTL I*, this Court considered an as-applied constitutional challenge to BCRA § 203's prohibition on the use of corporate treasury funds to finance electioneering communications. The three-judge district court in that case had construed this Court's decision in *McConnell* as foreclosing all such as-applied challenges. 126 S. Ct. at 1017-1018. This Court vacated the judgment of the district court, stating that *McConnell* "did not purport to resolve future as-applied challenges" to BCRA § 203. *Id.* at 1018. The Court remanded the case to the district court to consider the merits of the plaintiff corporation's as-applied challenge in the first instance. *Ibid.* On December 21, 2006, the three-judge

district court in that case held that BCRA § 203 is unconstitutional as applied to the advertisements in question. See p. 27, *infra*.

5. Appellant Christian Civic League of Maine, Inc., is a nonprofit, nonstock Maine corporation. J.S. App. 3a. Appellant's complaint asserts that it is tax-exempt under Section 501(c)(4) of the Internal Revenue Code (26 U.S.C.), and that it is interested in "laws protecting traditional marriage" and other public issues. Compl. paras. 16, 20. Appellant asserts that it does not qualify for any exception that would permit it to finance electioneering communications with corporate funds, alleging in particular that it is not a "qualified nonprofit corporation" under 11 C.F.R. 114.10, which implements the *MCFL* exception. Compl. para. 22.

Appellant's complaint in the instant case was filed on April 3, 2006. Appellant alleged that it planned to run a particular radio advertisement "between May 10 and early June." Compl. paras. 11, 13. The text of the advertisement (known as the "Crossroads" advertisement) is as follows:

> Our country stands at the crossroads—at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges—by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the

> Capitol switchboard at 202-224-3121 and ask for your senators. Again, that's 202-224-3121. Thank you for making your voice heard.

J.S. 1 n.1. Because Senator Snowe was a candidate in a primary election that took place June 13, 2006, the effect of specifically mentioning Senator Snowe under BCRA's electioneering-communications provisions was that the advertisement in question could not have been financed with appellant's treasury funds if it was broadcast in Maine between May 14, 2006, and June 13, 2006.

The complaint in this case further alleged that appellant "intends to run materially similar grass-roots lobbying ads * * * when there are pending matters in the legislative or executive branch that similarly require referencing a clearly identified candidate for federal office in broadcast communications to the citizens of Maine." Compl. para. 16. Appellant alleged that it "is concerned about a range of issues * * * that regularly have and will become issues in the legislative and executive branch." *Ibid.* Appellant alleged that, "[b]ecause the legislative and executive branches often deal with important legislative and executive branch issues in the periods before elections, there is a strong likelihood that [appellant's] need to broadcast grass-roots lobbying ads will again coincide with the electioneering communications blackout periods." *Ibid.* Appellant sought preliminary and permanent injunctive relief against enforcement of BCRA § 203 with respect to both the specific advertisement referenced in the complaint and any other "electioneering communications by [appellant] that constitute grass-roots lobbying." Compl. 13. A three-judge district court was convened pursuant to BCRA § 403(a)(1), 116 Stat. 114.

6. On May 9, 2006, the district court denied appellant's request for a preliminary injunction against enforcement of BCRA's restrictions on the financing of the "Crossroads" advertisement. See *Christian Civic League of Maine, Inc.* v. *FEC*, 433 F. Supp. 2d 81 (D.D.C. 2006) (*CCL I*).[2] The court concluded that "each of the four preliminary injunction factors counsels against the grant of the requested injunction." *Id.* at 87.

In holding that appellant had failed to establish a likelihood of success on the merits, the district court observed that BCRA "does not bar the proposed advertisement; it only requires that [appellant] fund it through a political action committee." *CCL I*, 433 F. Supp. 2d at 88. The court found that the "ability to form and administer separate segregated funds . . . has provided corporations . . . with a constitutionally sufficient opportunity to engage in express advocacy." *Ibid.* (quoting *McConnell*, 540 U.S. at 203). The court further explained that appellant could have financed the advertisement with corporate treasury funds if it had used a non-broadcast medium or had refrained from clearly identifying Senator Snowe. See *ibid.*

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[2] In a footnote, the district court observed that appellant's request for a preliminary injunction extended beyond the "Crossroads" advertisement to "encompass 'any electioneering communications by [appellant] that constitute grass-roots lobbying.'" *CCL I*, 433 F. Supp. 2d at 84 n. 1. The court observed, however, that appellant had "fail[ed] to define 'grassroots lobbying' (other than as including its proposed advertisement) or to identify any necessity for the application of such a broader injunction." *Ibid.* The court concluded on that basis that appellant's "request for the broader preliminary injunction [was] unwarranted." *Ibid.* The remainder of the court's opinion therefore addressed appellant's request for preliminary injunctive relief only insofar as that request pertained to the "Crossroads" advertisement. See *ibid.*

The district court also noted that appellant's advertisement

> appears to be functionally equivalent to the sham issue advertisements identified in *McConnell*. * * * [T]he advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection.

CCL I, 433 F. Supp. 2d at 88-89 (citation omitted). The court observed that a newsletter published by appellant had "already sounded an enthusiastic note regarding a potential challenger to Senator Snowe." *Id.* at 89. In addition, the court concluded that appellant's proposed "grassroots lobbying" exception to the coverage of BCRA § 203 "would seriously impair the government's compelling interest in protecting the integrity of the electoral process" because "candidates or their allies could easily schedule an issue for 'legislative consideration' during the run-up to an election as a pretext for broadcasting a particular subliminal electoral advocacy advertisement." *Ibid.*

The district court also held that appellant had failed to demonstrate that it would suffer irreparable harm absent a preliminary injunction because, notwithstanding BCRA's restrictions on "electioneering communications," the various alternative means the court had described were available for communicating appellant's views concerning the Marriage Protection Amendment. *CCL I*, 433 F. Supp. 2d at 89. The court further concluded that issuance of the requested preliminary in-

junction would substantially injure the Commission and would disserve the compelling public interest in the enforcement of BCRA. *Id.* at 90.

7. On May 12, 2006, appellant filed its jurisdictional statement and moved for expedited disposition of its appeal. In its Motion to Expedite and Consolidate Briefing (Mot. to Expedite) (at 2) appellant stated that a Senate vote on the Marriage Protection Amendment was expected to occur "on or about June 5, 2006." The motion further stated that appellant "only wants to run the ['Crossroads'] ad until the vote occurs and not thereafter." *Ibid.* The FEC opposed that motion, arguing that expedited consideration was unwarranted even though "the question whether the district court should have issued a *preliminary* injunction is likely to become moot before the Court can resolve the merits of [appellant's] current appeal." FEC Opp. to Mot. to Expedite 5.

On May 15, 2006, this Court denied appellant's motion to expedite the appeal. 126 S. Ct. 2062. On June 7, 2006, a vote to invoke cloture on the proposed Marriage Protection Amendment failed in the United States Senate, effectively terminating Senate consideration of the measure. See 152 Cong. Rec. S5554 (daily ed.). On October 2, 2006, this Court dismissed as moot appellant's appeal from the denial of its request for a preliminary injunction. 127 S. Ct. 336.

8. On September 27, 2006, the district court dismissed appellant's complaint in its entirety. J.S. App. 1a-16a.

a. Insofar as appellant challenged the constitutionality of BCRA § 203 as applied to communications other than the "Crossroads" advertisement, the district court held that appellant's claims were "not ripe and/or too

speculative and hypothetical to be justiciable." J.S. App. 2a; see *id.* at 4a-9a. The court explained that appellant "bears the burden of clearly alleging and ultimately proving that the non-Crossroads claims are justiciable." *Id.* at 5a. The court observed, however, that appellant "has admitted that it has no current plans to broadcast any advertisements about any issue." *Ibid.*

The district court further explained that, under Article III of the Constitution, federal courts are precluded from issuing "opinion[s] advising what the law would be upon a hypothetical state of facts," J.S. App. 6a (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990)), and may resolve constitutional questions only "in the context of a specific live grievance," *ibid.* (quoting *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969)). The district court also relied (see *id.* at 7a) on *Renne* v. *Geary*, 501 U.S. 312 (1991), in which this Court held that a First Amendment challenge to a state ban on political-party endorsements of candidates for non-partisan offices was unripe because the plaintiffs had failed to allege a present intention to endorse any specific candidate and had not compiled an adequate factual record as to any such endorsement. The district court found that appellant similarly lacks any present intention to broadcast any particular advertisement, and that appellant had not developed any factual record about what such an advertisement might say, how it might be created, or how it might be financed or broadcast. See J.S. App. 7a-8a. The court concluded:

> What [appellant] really seeks via its non-Crossroads claims is for the court to promulgate a rule exempting all "grass roots lobbying"—a phrase [appellant] never defines—from the Act's electioneering communications provision. This court, however, decides

> present disputes based on particular facts—and especially so where faced with an as-applied challenge, as here. Absent a concrete dispute, this court lacks jurisdiction.

Id. at 9a (footnote omitted).

b. With respect to the "Crossroads" advertisement, the district court held that appellant's claims were "moot and not saved by the 'capable of repetition, yet evading review' exception to that doctrine." J.S. App. 2a; see *id.* at 10a-13a. The court found that the "Crossroads" claims were moot because "the occurrence of the June 2006 Senate vote on the relevant legislation leaves the court without power to provide effectual relief." *Id.* at 10a.

The district court noted that the "capable of repetition, yet evading review" exception to mootness principles applies "only in exceptional situations," J.S. App. 11a (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983)), and it concluded that appellant had failed to satisfy either prong of the applicable test, *id.* at 11a-13a. With regard to the "capable of repetition" prong, the court noted that appellant was required to establish a "reasonable expectation or a demonstrated probability that the *same* controversy will recur involving the same complaining party." *Id.* at 11a (quoting *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982)) (quotation marks omitted and emphasis added by district court). The court explained that adjudication of appellant's constitutional claim would require it to assess the legal significance of an unusual combination of circumstances, and it found that this "confluence of specifics" was unlikely to recur. *Id.* at 12a. The court also held that any such future claims would not necessarily evade review because a challenge filed substantially in advance of the relevant

election would "stand a strong chance of gaining full appellate review in light of the Act's requirement that the judiciary expedite consideration of such challenges." *Id.* at 13a (citing BCRA § 403(a)(4), 116 Stat. 113).

ARGUMENT

Appellant contends (J.S. 8-24) that its as-applied constitutional challenge to BCRA § 203 is "capable of repetition yet evading review," and that its suit therefore remains justiciable, notwithstanding the fact that the Senate vote on the Marriage Protection Amendment took place in June 2006. The three-judge district court rejected that argument, holding that no substantially similar dispute involving appellant is likely to recur, and that any such dispute that might arise could potentially receive full appellate consideration if suit were filed sufficiently in advance of the relevant election. Those holdings are correct. This Court therefore should dismiss the appeal as moot or affirm the judgment of the district court. In the alternative, the Court may wish to hold the jurisdictional statement pending the possible filing and disposition of any jurisdictional statements in *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260 (D.D.C. Dec. 21, 2006) (*WRTL II*).

1. a. When it sought expedited consideration of its appeal of the district court's denial of a preliminary injunction, appellant represented to this Court that a Senate vote on the Marriage Protection Amendment was expected in early June and that appellant "only wants to run the ['Crossroads'] ad until the vote occurs and not thereafter." 05-1447 Mot. to Expedite 2. The Senate terminated its consideration of the Marriage Protection Amendment in June 2006, and appellant has identified no reason to believe that any subsequent Senate vote on

that measure will occur in the foreseeable future. Moreover, because appellant chose not to run the "Crossroads" advertisement during the 30-day period before the June Senate primary election in Maine, it cannot be subject to any potential future Commission enforcement action whose validity might turn on the determination whether BCRA's financing restrictions are constitutional as applied to that advertisement.

Because no live controversy exists concerning the constitutionality of BCRA § 203 as applied to the "Crossroads" advertisement, appellant's claim with respect to that advertisement is moot and no longer suitable for judicial resolution. See *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000) (explaining that the "Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins * * * [this Court's] mootness jurisprudence"). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis*, 494 U.S. at 477 (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain [this Court's] jurisdiction * * * it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals." *Id.* at 477-478.

b. This Court has recognized an exception to mootness principles for situations that are "capable of repetition, yet evading review." See *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). "[T]he capable-of-repetition doctrine applies only in exceptional situations," *Lyons*, 461 U.S. at 109, "where the following two circumstances [are] simultaneously present: (1) the

challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again," *Spencer* v. *Kemna*, 523 U.S. 1, 17-18 (1998) (citations and internal quotation marks omitted) (brackets in original) (quoting *Lewis*, 494 U.S. at 481). For an alleged wrong to be considered "capable of repetition," "there must be a 'reasonable expectation' or 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy*, 455 U.S. at 482 (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)). Accord, *e.g.*, *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 774 (1978). This Court "has never held that a mere physical or theoretical possibility was sufficient" to satisfy this test; if that were enough, "virtually any matter of short duration would be reviewable." *Murphy*, 455 U.S. at 482.

As the district court correctly held (J.S. App. 11a-13a), appellant's constitutional claim with respect to the "Crossroads" advertisement is not "capable of repetition" within the meaning of this Court's decisions, since appellant has failed to demonstrate "a reasonable expectation or demonstrated probability that the same controversy will recur involving the same complaining party." *Murphy*, 455 U.S. at 482 (citation and internal quotation marks omitted). Because the instant suit involves an as-applied rather than a facial challenge to BCRA § 203, a broad range of idiosyncratic circumstances would potentially bear on the correct disposition of appellant's claim. Those circumstances include appellant's decision to run a broadcast advertisement about the Marriage Protection Act just before a federal primary election in Maine; the group's determination to

finance the advertisement with corporate funds, even though it could use a separate segregated fund; and the group's decision to identify a Senate candidate in the advertisement, even though it could encourage grassroots action without doing so. Although appellant need not show that "the precise facts related to the Crossroads Ad" (J.S. 10) are likely to be replicated, any future dispute must at least involve a substantially similar factual setting in order for the two cases to present the "same controversy."[3]

Whatever the precise nature of the showing that may be required in this context, appellant cannot satisfy the applicable standard on the record in this case. At his deposition, appellant's longtime executive director testified that he could not recall any prior occasion on which appellant had run a broadcast advertisement that had identified a federal office holder. See FEC Opp. to Mot. for Prelim. Inj. 11-12. Appellant later introduced evidence (see J.S. 3-4) that in July 2004 it had run a radio advertisement identifying Senators Snowe and Collins. There was no Senate election that year in Maine, however, and the primary election for other federal offices was held on June 8, 2004. See Bureau of Corporations, Elections & Commissions, State of Maine, *Election Results* (visited Dec. 28, 2006) <http://www.maine.gov/sos/cec/elec/prior1st.htm>. Thus, the only broadcast advertisement mentioning a federal office holder that

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[3] Contrary to appellant's contention (J.S. 10), the district court did not hold that a dispute is capable of repetition only if the "precise facts" of the case are likely to recur. Rather, the thrust of the court's analysis was that the combination of circumstances involved in this case was sufficiently unusual that a materially similar controversy is unlikely to arise again. That conclusion is correct for the reasons stated at pp. 18-22, *infra*.

appellant has been shown to have financed did not fall within BCRA's definition of an "electioneering communication."

Nor has appellant demonstrated any likelihood that its advertising practices will change in the future. In its complaint, appellant alleged in general terms that it "intends to run materially similar grass-roots lobbying ads falling within the electioneering communication prohibition period[s] before" other federal primary and general elections. Compl. para. 16. In his deposition, however, appellant's executive director testified that appellant had no plans to run any advertisements other than the "Crossroads" advertisement, and that the group had "no other issues selected for future campaigns." J.S. App. 6a. Appellant's counsel likewise represented that the group had "no concrete plans to do an ad" other than the "Crossroads" advertisement. *Ibid.* Absent any demonstrated likelihood that appellant will again seek to finance substantially similar advertisements during the periods covered by BCRA § 203, appellant's "bare statement of intention is insufficient to escape mootness." *Fox* v. *Board of Trs. of SUNY*, 42 F.3d 135, 143 (2d Cir. 1994); cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (holding that "'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury" required for Article III standing).

The anomalous circumstances under which this case arose reinforce the conclusion that the current controversy is unlikely to recur. Record evidence indicates that appellant's expressed intent to finance the "Crossroads" advertisement reflected a hastily arranged effort to facilitate a constitutional challenge to BCRA § 203.

Appellant filed this lawsuit ten days after an official of the Colorado group Focus on the Family sent an e-mail to leaders of a number of organizations, including appellant's executive director. That e-mail forwarded a message from counsel offering to seek a federal court injunction at no charge on behalf of "any group" that planned a "grass roots lobbying" advertisement during the electioneering-communication period in its State, adding that "[t]his may even involve an appeal to the U.S. Supreme Court (which would result in a landmark ruling)." FEC Opp. to Mot. for Prelim. Inj. Exh. B. The e-mail explained that the recipients had been selected "because [they were] in [States] that could be affected by McCain-Feingold restrictions on Marriage Amendment lobbying ads that target U.S. Senators who are on the ballot." Before receiving that communication, appellant had given no consideration to financing broadcast advertising during 2006. See *id.* at 7. About one hour after receiving the e-mail, however, appellant's executive director agreed to "run an ad in that period of time mentioning Olympia Snowe." *Id.* Exh. C. Focus on the Family subsequently provided appellant with the text of the "Crossroads" advertisement that is at issue in this case. *Id.* at 8.

The funding mechanism chosen by appellant reinforces the inference that the planned advertising campaign was primarily a means to engender litigation. When the complaint was filed, appellant lacked the $3992 needed to air the "Crossroads" advertisement on local radio. See FEC Opp. to Motion for Prelim. Inj. 9-10; *CCL I*, 433 F. Supp. 2d at 86. Appellant subsequently represented that a single donor had agreed to provide the necessary funds. See *ibid.* That donation would have been within the $5000 limit on individual

contributions to a separate segregated fund if appellant had chosen to establish one, see 2 U.S.C. 441a(a)(1)(C) (Supp. IV 2004), and the individual donor could simply have financed the advertisement himself without the need for appellant to act as a conduit. Because the availability of those alternatives would be directly relevant to the resolution of appellant's as-applied constitutional challenge, the absence of any reason to believe that comparable circumstances will recur in the future further undermines appellant's contention that it will likely confront the "same controversy" again.

c. Appellant appears to contend (J.S. 11-13) that it has satisfied the "same controversy" requirement by avowing an intent to finance future advertisements that (i) constitute "grassroots lobbying" and (ii) fall within BCRA § 203's definition of "electioneering communication." Because appellant refuses to advocate any specific definition of the term "grassroots lobbying," its contention that the "Crossroads" advertisement qualifies (and that appellant intends to finance other "grassroots lobbying" communications in the future) provides no cogent basis for concluding that the "same controversy" is likely to recur.[4] And if every dispute about the

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[4] Appellant identifies two possible definitions of the term "grassroots lobbying," see J.S. 24-26 nn.27-28, but carefully refrains from endorsing either one. The statement in the "Crossroads" advertisement that, "*[u]nfortunately*, your senators voted against the Marriage Protection Amendment two years ago," J.S. 1 n.1 (emphasis added), would take that advertisement outside the two proposed "grassroots lobbying" exceptions that appellant identifies. See J.S. 25 n.27 (stating that the criteria for the first exception "are not met if the communication includes any reference to * * * the candidate's record or position on any issue"); J.S. 25 n.28 (providing, as one condition for the second exception, that, "[i]f the communication discusses the candidate's position or record on the matter, it does so only by quoting the candi-

constitutionality of BCRA § 203's restrictions on the financing of "electioneering communication[s]" were deemed to present the "same controversy," the distinction between facial and as-applied challenges that this Court recognized in *WRTL I* would effectively be eliminated. See J.S. App. 8a.

d. Appellant suggests (J.S. 10, 13 n.14) that election-related disputes necessarily or at least presumptively satisfy the "capable of repetition yet evading review" exception to the rule that moot cases are non-justiciable. This suit, however, differs in a fundamental way from the cases on which appellant relies. When a plaintiff demonstrates an intent to participate in electoral processes on an ongoing basis, a court may have reasonable grounds for concluding that any injury the plaintiff suffers during one election will be repeated during later electoral cycles. The gravamen of appellant's as-applied challenge, by contrast, is that it *lacks* the intent to influence federal elections, but that its purported issue advocacy was impeded by the fortuity that the Senate vote on which it sought to comment coincided with a Maine Senate primary. In light of appellant's disavowal of any intent to engage in electoral advocacy, there is no sound reason to conclude on the record before this Court that appellant will again wish to finance advertisements mentioning candidates for federal office during the brief pre-election periods covered by BCRA § 203.

e. Even if a substantially similar controversy were to recur in the future, appellant's as-applied challenge would not necessarily evade review. See J.S. App. 13a. This suit was filed in April 2006, just six weeks before

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date's own public statements or reciting the candidate's official action, such as a vote, on the matter").

the start of the applicable electioneering-communication period. The district court noted that a suit brought substantially in advance of the relevant election would "stand a strong chance of gaining full appellate review in light of [BCRA's] requirement that the judiciary expedite consideration of such challenges." *Ibid.*; see BCRA § 403(a)(4), 116 Stat. 114. Indeed, even the massive *McConnell* litigation took less than 21 months from the time complaints were filed until the final decision of this Court. There is no reason to suppose that the time between the filing of a far simpler suit like this one and the occurrence of an election would be "always so short as to evade review." *Spencer*, 523 U.S. at 18.

Appellant contends (J.S. 20-22) that the communicative activities in which it wishes to engage cannot feasibly be planned well in advance of the proposed communications. The proposed constitutional amendment discussed in the "Crossroads" advertisement was introduced in early 2005, however, and appellant appears to have been aware at that time of Senator Snowe's likely candidacy in the 2006 election and her position on the amendment. See FEC Opp. to Mot. for Prelim. Inj. 13-14; Plaintiff Reply in Support of Mot. for Prelim. Inj. 2. Appellant's contention that it must react quickly to emerging legislative events is further belied by the substantial indications that the proposed "Crossroads" advertisement was conceived as a device to generate litigation. See pp. 19-21, *supra*.

2. As the district court correctly held, appellant's claims with regard to advertisements other than the "Crossroads" advertisement are "not ripe and/or too speculative and hypothetical to be justiciable." J.S. App. 2a. Appellant's continuing failure to articulate a clear and administrable definition of the term "grass-

roots lobbying" underscores the absence of any focused dispute between the parties and the impropriety of any injunctive or declarative relief incorporating that term. See Fed. R. Civ. P. 65(d) ("Every order granting an injunction * * * shall be specific in terms * * * [and] shall describe in reasonable detail * * * the act or acts sought to be restrained."). And even if appellant had articulated a clear proposed legal standard, its failure to describe with any precision the sort of advertisements it intends to finance means that there is not even a hypothetical set of facts to which the standard can be applied.

In *Renne*, this Court relied on comparable factors in holding unripe the plaintiffs' constitutional challenge to restrictions on political speech. The plaintiffs in that case had challenged a state-law provision barring political parties from endorsing candidates for nonpartisan office. This Court stated:

> We also discern no ripe controversy in the allegations that respondents desire to endorse candidates in future elections * * * . [Plaintiffs] do not allege an intention to endorse any particular candidate, nor that a candidate wants to include a party's or committee member's endorsement in a candidate statement. We possess no factual record of an actual or imminent application of [the state-law restriction] sufficient to present the constitutional issues in clean-cut and concrete form. We do not know the nature of the endorsement, how it would be publicized, or the precise language [state officials] might delete from the voter pamphlet. To the extent [plaintiffs] allege that a committee or a committee member wishes to "support" or "oppose" a candidate

> other than through endorsements, they do not specify what form that support or opposition would take.

501 U.S. at 321-322 (citations and internal quotation marks omitted).

Similarly here, appellant has not identified the candidate(s) it may wish to identify in future communications, the legislative issues those communications might discuss, the timing or location of the advertisements, the nature of the electoral environment in which the advertisements might air, or the impediments to using financing methods (*e.g.*, a separate segregated fund) that would not trigger BCRA § 203's restrictions. In the absence of such information, appellant's challenge to possible future applications of BCRA § 203 does not "present the constitutional issues in 'clean-cut and concrete form.'" 501 U.S. at 322 (quoting *Rescue Army* v. *Municipal Ct.*, 331 U.S. 549, 584 (1947)).

3. Appellant requests (see J.S. i, 24-29) that this Court consider the merits of its contention that BCRA § 203 is unconstitutional as applied to its "Crossroads" advertisement in particular and to "genuine grassroots lobbying" in general. That course would be inappropriate even if this Court were to conclude that appellant's claims are currently justiciable. Because the district court did not resolve the merits of appellant's constitutional claims, there is no pertinent ruling for this Court to review. And because only minimal discovery occurred before the district court denied preliminary injunctive relief in May, the existing evidentiary record is inadequate for this Court to adjudicate appellant's as-applied challenge. For those reasons, the second and third questions presented in the jurisdictional statement are not properly before this Court, which "ordinarily 'do[es] not decide in the first instance issues not decided

below.'" *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (quoting *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999)).

To the extent that the evidentiary record has been developed, that record does not support appellant's claim for a constitutional exemption from BCRA § 203's generally applicable restrictions on the financing of electioneering communications. See *CCL I*, 433 F. Supp. 2d at 87-89 (holding, in connection with the denial of preliminary injunctive relief, that appellant had failed to establish a substantial likelihood of success on the merits of its as-applied constitutional challenge). Evidence obtained in connection with the motion for a preliminary injunction indicates that the Crossroads advertisement was prompted by the then-imminent Senate primary election and had the potential to affect electoral outcomes. See pp. 11, 19-21, *supra*. The evidence further indicates that appellant easily could have publicized its message through other lawful means and could have financed it through a separate segregated fund. See pp. 20-21, *supra*.

The Court in *McConnell* recognized that BCRA's electioneering-communication restrictions can be applied constitutionally to communications that, like the "Crossroads" advertisement, discuss legislative concerns but can also be expected to influence federal elections. The Court concluded that BCRA's minimal impact on such advertising was constitutionally acceptable because corporations and unions could "finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *McConnell*, 540 U.S. at 206. Appellant seeks a quasi-legislative carve-out that both Congress and the Court

in *McConnell* have considered and rejected, and that ignores the carefully balanced set of benefits and burdens that the Act applies to corporations and unions and their separate segregated funds. In any event, because the underlying as-applied claims in this case are nonjusticiable and therefore were not addressed by the district court on the merits, this case does not provide an occasion for the Court to address the validity of such a carve-out.

4. For the foregoing reasons, the decision of the three-judge district court is correct and does not warrant plenary appellate review in this Court. On December 21, 2006, however, a different three-judge panel of the District Court for the District of Columbia issued its decision in *WRTL II*, on remand from this Court's decision in *WRTL I*. The court in *WRTL II* considered a constitutional challenge to the application of BCRA § 203 to three broadcast advertisements that the plaintiff had proposed to air in 2004. See slip op. 2-6. The district court held that the plaintiff's challenge was "capable of repetition, yet evading review," and was therefore justiciable, see *id.* at 9-13, and that BCRA § 203's financing restrictions are unconstitutional as applied to the advertisements in question, see *id.* at 14-26. With respect to the mootness issue, the court in *WRTL II* expressed disagreement with the holding of the three-judge district court in the instant case. See slip op. 13 n.14. On December 29, 2006, the FEC and intervenor-defendants filed notices of appeal to this Court of the district court's ruling in *WRTL II*.

Thus, if a jurisdictional statement is filed in *WRTL II* and this Court notes probable jurisdiction, the Court will be required to determine whether the plaintiff's suit is "capable of repetition, yet evading review." Because

of the unique circumstances presented by each case —including the fact that the plaintiff in *WRTL II* has engaged in much more extensive broadcast issue advertising in the past than has appellant—the Court's resolution of the mootness-issue in that case will not necessarily control the outcome here. Nevertheless, the Court may wish to hold the jurisdictional statement in the instant case pending the possible filing and disposition of any jurisdictional statements in *WRTL II*.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction, or the judgment of the district court should be affirmed. In the alternative, the jurisdictional statement should be held pending the filing and disposition of any jurisdictional statements in *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260 (D.D.C. Dec. 21, 2006), and then disposed of as appropriate.

Respectfully submitted.

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In The

Supreme Court of the United States

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC., *Appellant,*

v.

FEDERAL ELECTION COMMISSION, ET AL., *Appellees.*

On Appeal from the United States District Court
for the District of Columbia

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January 8, 2007

Corporate Disclosure Statement

The Christian Civic League of Maine, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Argument[1]

The district court erred in dismissing the Christian Civic League's claims as to the Crossroads Ad as moot because it is not capable of repetition yet evading review. The court found that this controversy, a classic example of a situation meriting the exception, was neither capable of repetition nor would a recurrence "necessarily" evade review. In doing so, the lower court severely distorts the requirements for the exception, leading another three-judge court in the district, "confronted with essentially the same issue," to "respectfully disagree" with the holding on appeal here. *Wisconsin Right to Life, Inc. v. FEC*, No. 04-1260, 2006 WL 3746669, at *4 (D. D.C. Dec. 21, 2006) ("*WRTL II*").

Any future challenge to the electioneering communication prohibition will be as applied. By defining an as-applied challenge as limited to all of its particular facts for purposes of the capable of repetition prong of the exception to mootness, the court has effectively ruled that the constitutionality of applying the electioneering communication prohibition to grassroots lobbying is never capable of repetition.

The scenario the court proposed as satisfactorily ensuring complete judicial review of the controversy is "unreasonable, if not fanciful." *WRTL II*, No. 04-1260, 2006 WL 3746669, at *4. The court ruled that the legal question presented will not escape full judicial review, despite the experience here and in *Wisconsin Right to Life, Inc. v. FEC*, and findings by the district court in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D. D.C. 2003), supporting the commonsense conclusion that the question will likely *only* arise when it cannot be fully reviewed.

The lower court's analysis departs from well-established standards, and if consistently applied to the controversy this

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[1]The FEC and Intervenors filed separate responses to the League's Jurisdictional Statement. Since the relevant arguments presented in each motion are largely the same, the League responds to both Motions in this Opposition.

case presents, the important legal question of the constitutionality of applying the electioneering communication prohibition to grassroots lobbying could never be fully reviewed. This Court should correct the lower court's error and resolve the question the League's suit presents.

I. The Holding Below Precludes Full Review of the Legal Question This Case Presents.

The FEC argued in *McConnell v. FEC*, 540 U.S. 93 (2003), that as-applied challenges could be considered later and the Court in *McConnell* should simply consider the facial challenge. Then in *Wisconsin Right to Life, Inc. v. FEC*, 126 S. Ct. 1016 (2006) ("*WRTL I*"), the FEC and Intervenors insisted that as-applied challenges were precluded by *McConnell*. In oral argument, the Chief Justice described this as a bait and switch. Transcript of Oral Argument at 22, *WRTL v. FEC*, 126 S. Ct. 1017 (No. 04-1581). Just as Defendants argued in *WRTL I*, that this Court's decision in *McConnell* precluded all as-applied challenges to the electioneering communication prohibition, The FEC and Intervenors argued here that *McConnell* precludes all preliminary injunctions in as-applied challenges to the prohibition. The district court denied CCL preliminary injunctive relief; this Court found that denial moot. *Christian Civic League of Maine, Inc. v. FEC*, 127 S.Ct. 336 (2006). The district court has now dismissed as moot the question of the constitutionality of the electioneering communication prohibition with respect to the League's Crossroads Ad and ruled that the question of its application is not ripe with respect to any future ads. If tolerated, this last maneuver puts citizen groups in an endless loop of being mooted but never ripe in their efforts to obtain this Court's constitutional judgment on this important public issue.

This situation epitomizes the purpose of the exception to mootness. The exception provides the time courts need to consider the merits of a challenge to the constitutionality of a

statute's application when, as here, it is election-related and the situation will, by its very nature, quickly become moot. Resolving the particular legal question presented then simplifies future challenges, making adjudication on the eve of election simpler or even unnecessary. "The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Storer v. Brown*, 415 U.S. 724, 738 n.8 (1974).

Under the lower court's holding, the only apparent way for a court to hear an as-applied challenge to the electioneering communication prohibition is to require a plaintiff to rack up a string of failed preliminary injunction attempts to unequivocally establish that the controversy is indeed capable of repetition and then to file suit far enough in advance that the ruling can be reached before the suit becomes moot. The first requirement offends the First Amendment, the second is untenable.

II. The Mootness Exception Applies Here.

A. The controversy here is a classic example of a situation justifying the well-established exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." In *WRTL II*, the three-judge court noted that "no less than ten federal court decisions involving election-related challenges in which this exception was applied well establishes this point." 2006 WL 3746669, at *3. *See also id.* (noting Intervenors' "grudging[] characteriz[ation] [of] the application of this exception as a 'close question' notwithstanding our Circuit Court's holding in *Branch v. FCC*, 824 F.2d 37, 41 n. 2 (D.C.Cir.1987)"). As the court in *WRTL II* correctly observed, "[p]laintiff's factual predicament is not novel. Indeed, it is a classic example of the well-established exception to the mootness doctrine for cases that are 'capable of repetition, yet evading review.'" 2006 WL 3746669, at *3. This Court found

unremarkable the exception's application to the same issue when it heard Wisconsin Right to Life's first appeal. *See* App. 13 n.14 (noting that the question of the mootness exception was squarely before this Court there). The weight of applicable authority holding that election-related disputes are archetypical situations qualifying for the exception justifies presumption of its application here. *Cf.* FEC Mot. Dismiss or Aff. at 22.

B. As-applied challenges do not constitute a perfect storm that must be capable of repetition to escape mootness. The district court anchors its unprecedented standard to the fact that this is an as-applied challenge. The court conceded that as-applied challenges to a statute "*may* be 'capable of repetition' for purposes of the [mootness] exception," but then reads into "as-applied" a "perfect storm" of conditions so specific as to make the legal questions the League's suit presents incapable of repetition. App. 12a.[2]

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[2]In support of its "precise" standard for as-applied challenges, the lower court cites *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 422-23 (D.C. Cir. 2005) ("*PETA*"). The controversy at issue in *PETA* was not election-related, so it says nothing about election-related suits. Nor does the *PETA* court's analysis support the conclusion that a "perfect storm" of factual circumstances must be repeatable for as-applied challenges to survive mootness. The *PETA* court observed that, as the lower court recited, what must be shown as likely to be repeated "must be defined in terms of the precise controversy it spawns." *Id.* at 422. First, this familiar proposition, by itself, hardly justifies the conclusion that here, at least seven purely factual circumstances must be shown to be reasonably expected to recur. Moreover, *PETA*'s holding is that what must be shown to be capable of repetition to save a claim from mootness is based on the facts *as they relate to the legal questions the complaint raises. Id.* at 423 ("the alleged 'wrong' [must be] put in terms of the legal questions it presents for decision."). So what must be capable of repetition is a) what the plaintiff wanted to do, and b) the purportedly unconstitutional action taken by the government, including constitutionally permissible reasons for the action. This reflects the constitutional analysis required to resolve the controversy.

The *PETA* court looked to the complaint to discover the nature of the

If this analysis is correct (that as-applied challenges are unique and incapable of repetition), the question of the constitutionality of the electioneering communication prohibition as applied to grassroots lobbying will never be adjudicated on its merits because all challenges to the electioneering communication prohibition will be as-applied. The lower court's analysis of the exception to mootness to as-applied challenges is unprecedented.

If correct, it would follow that some prior cases were wrongly heard. One example would be *Storer,* where an as-applied election law controversy was found capable of repetition, perhaps with different *plaintiffs*. "[T]he issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections."

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legal question presented, 396 F.3d at 423, and found that PETA's claim was not capable of repetition because "the legal questions it presents for decision," as defined above, were that its proffered expression was wrongly rejected for display because it satisfied the requirements for acceptance as published and applied. *Id.* at 422-23. Accordingly, the controversy was "highly fact specific" because "PETA thinks the decision turns on . . . what design criteria . . . the Commission actually employed, whether PETA's [sponsorship] put it on a different track than [the other] artists, and whether . . . the rejection of PETA's designs constituted content or viewpoint discrimination . . . ." *Id.* at 423.

Here, the League claims that applying the electioneering communication prohibition to the Crossroads Ad is unconstitutional because it is not narrowly tailored to a compelling government interest. Resolving the legal issue presented requires that a court determine whether the electioneering communication prohibition can be constitutionally applied to grassroots lobbying ads such as the Crossroads Ads. In short, the question is whether ads such as the Crossroads ad are the functional equivalent of express advocacy. What the League must show a reasonable expectation of recurring is what it has alleged in its Complaint: that the electioneering communication prohibition can reasonably be expected to be applied to an ad like the Crossroads Ad. The circumstances urged as unrepeatable by the FEC and Intervenors and the court below are not relevant to the legal issue presented, and it is error to require the League to show that they will recur.

415 U.S. at 738 n.8.[3] *See also Pearlman v. Vigil-Giron*, 71 Fed. Appx. 11 (10th Cir.2003) (as-applied challenge was not moot even though challenged ballots were certified and distributed; *Belitskus v. Pizzingrilli*, 343 F.3d 632, 649 (3d Cir. 2003) (as-applied derivative voter claims not mooted after election had

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[3]Relaxing the "same plaintiff" requirement in election-related cases may be an artifact of the exception's application to election- and pregnancy-related cases. At least three federal Circuit courts have found support for the proposition that the capable of repetition prong of the exception is satisfied when it is reasonably expected that *some* plaintiff will find itself in the same controversy in *Storer*, *Honig v. Doe*, 484 U.S. 305 (1988) (dissenting opinion); *Dunn v. Blumstein*, 405 U.S. 330 (1972); and *Rosario v. Rockefeller*, 410 U.S. 752 (1973). According to the Seventh Circuit,

> while canonical statements of the exception to mootness for cases capable of repetition but evading review require that the dispute giving rise to the case be capable of repetition *by the same plaintiff* . . . the courts, perhaps to avoid complicating lawsuits with incessant interruptions to assure the continued existence of a live controversy, do not interpret the requirement literally, at least in abortion and election cases.

Majors v. Abell, 317 F.3d 719, 723 (7th Cir. 2003); *see also Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 661-662 (5th Cir. 2006) ("despite the Supreme Court's reminder that there must be a 'reasonable expectation that the same complaining party would be subject to the same action again,' *Weinstein*, 423 U.S. at 149, the Court does not always focus on whether a particular plaintiff is likely to incur the same injury."); *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005) ("Courts have applied the capable of repetition yet evading review exception to hear challenges to election laws even when the nature of the law made it clear that the plaintiff would not suffer the same harm in the future.").

In any event, as the court in *Majors* concluded, regardless of whether an election law controversy must be capable of repetition with the same plaintiff, a court does not require that a plaintiff explain why it has not found itself in the same circumstances to satisfy the capable of repetition prong of the exception. Just as the court does not conduct a hearing on the fertility or plans of a plaintiff attacking an abortion statute after her pregnancy has terminated to determine whether the controversy is capable of repetition, "in an election case the court will not keep interrogating the plaintiff to assess the likely trajectory of his political career." *Majors*, 317 F.3d at 723.

passed); *Teper v. Miller*, 82 F.3d 989, 992 (11th Cir. 1996) (as-applied challenge to campaign contribution regulations during legislative session not moot when General Assembly adjourned). Surely as-applied challenges addressing the particular idiosyncrasies of ballots or by particular candidates are at least as "fact-specific" as the League's challenge of the application of the electioneering communication prohibition to its broadcast, yet these cases were found to satisfy the exception to mootness.

C. The lower court lists seven specific facts as insufficiently likely to again converge to save the League's claim from mootness and allow adjudication of its merits. In its Jurisdictional Statement, the League pointed out the defects of considering these seven and ignoring other important facts regarding a reasonable expectation that the League will be subject to the same prohibition, and will not repeat them here. *See* JS 14-18. The FEC attempts to rehabilitate the lower court's "perfect storm" analysis by referring to "the thrust of the court's analysis" and ignoring the details of that analysis. FEC Mot. Dismiss or Affirm at 18 n.3, 18-22. The Intervenors argue that a loose subset of four "perfect storm" factors sufficiently demonstrate that the legal question in the League's case is not capable of repetition. Inter's' Mot. to Aff. at 15. In addition to making the standard the court announced less restrictive than it actually is, Intervenors ignore that the three-judge court in *WRTL II* explicitly rejected consideration of three of those same factors in its analysis of whether the mootness exception applied: the context of the Ad's creation, the availability of other means of conveying the desired message, and the circumstances of the campaign. 2006 WL 3746669, at *3; *see also id.* at *4 n.14 (rejecting contextual factors generally). The fourth factor, the content of the Ad, was not even considered by the lower court here in its mootness analysis and instead is relevant to the merits of the League's claims.

D. Questions about the League's role as a plaintiff in future controversies are unwarranted. The FEC and Intervenors are selective in their citations to the record in arguing that the League will not again find itself facing the same legal controversy. It alleged in its Verified Complaint that it "intends to run materially similar grass-roots lobbying ads falling within the electioneering communication prohibition period before the [2006] general election and . . . before future . . . elections in Maine when there are pending matters in the legislative or executive branch that . . . require referencing a clearly identified candidate for federal office," and listed nine other issues of interest that regularly become issues for the legislative and executive branches. VC ¶ 16. In 2004, the League engaged in grassroots lobbying for a previous permutation of the Federal Marriage Amendment ("FMA"). *CCLM*, No.06-0614, Heath Dep. 34:3-35:16 (Doc. # 26-4) (listing methods of communication used in 2004 grassroots lobbying in favor of the FMA). The League mounted a radio campaign in support of the 2004 FMA in July 2004 encouraging people to contact Senators Snowe and Collins and ask them to support traditional marriage. *Id.*, Heath Decl. ¶¶ 6, 8 (Doc. # 26-2); Pl.'s Resp. to Def.'s Req. Prod. 2, 3 and 4 (Doc. # 26-7, 26-8, 26-9, 26-10, 26-11, 26-12). In 2006, the lobbyist for the League participated in multiple conference calls, e-mail exchanges and discussions with legislators, grass roots activists, media, and national level pro-family groups regarding the FMA. *Id.*, Heath Decl. ¶ 9 (Doc. # 26-2). There is ample evidence that the League will again find itself in the same legal controversy as presented by its desire to run the Crossroads Ad.[4]

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[4]Remarks about plans for other broadcasts, Inter's' Mot. Aff. at 16; App. 5a-6a, were responses to questions about *then-current* plans. They cannot be construed to mean that the League never again intends to run grassroots lobbying ads that will collide with electioneering communication prohibition. How could the League accurately respond about future plans when it

E. In an attempt to show that this controversy will not evade full review, the FEC and Intervenors (and the lower court) propose hypothetical schedules allowing review. The court below surmised that

> [a] plaintiff could bring its lawsuit much earlier than did the League. A . . . plaintiff . . . might bring a lawsuit more than a year in advance of an election if it had concrete plans to broadcast within sixty days of the election a specific advertisement, paid for with corporate funds, that mentioned a declared candidate. Such a lawsuit would be ripe and stand a strong chance of gaining full appellate review . . . .

App. 13a. [5] This litigation and that in *WRTL* have proved this to be "unreasonable, if not fanciful." *WRTL II*, 2006 WL 3746669, at *3.

Conclusion

The motions to dismiss or affirm should be denied. Probable jurisdiction should be noted and briefing ordered as requested in the Jurisdictional Statement.

In the alternative, the case should be held for disposition

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could not know at the time of the responses what and when legislative matters touching on its areas of interest will again arise?

[5]Despite the expedition afforded this case, including expedited discovery, fully eight months have passed without a federal court adjudicating the merits of the League's case, let alone reviewing it on appeal. As the three-judge court noted in *WRTL II*, 2006 WL 3746669, at *4, the district court in *McConnell* recognized that legislation giving rise to the need to broadcast grassroots lobbying ads such as the League's, "typically arise[] in the 30- and 60-day periods before a federal primary or general election" (*citing McConnell v. FEC*, 251 F.Supp. 2d at 793 (Leon, J.)). The *WRTL II* court also noted that "as-applied challenges, to be effective, must be conducted during the expedited circumstances of the closing days of a campaign." *Id.* at *7.

after this Court decides *WRTL II*, for consideration of issues possibly not dealt with in *WRTL II* (such as the addition of government officials' position on the matter that is the subject of the grassroots lobbying).

Respectfully submitted,

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